IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE,
Petitioner,

v.

JESSIE SHORT, ET AL., and THE UNITED STATES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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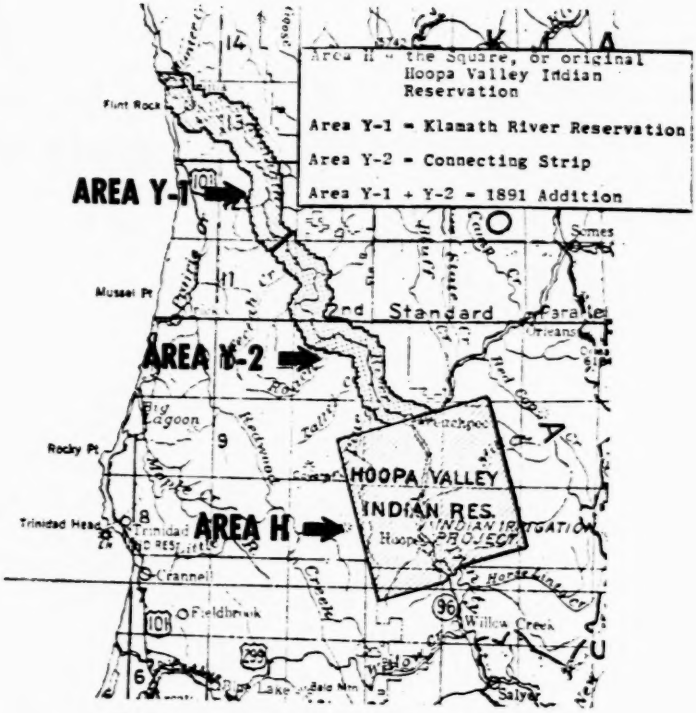
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MAP OF PART OF NORTHERN CALIFORNIA

CHRONOLOGY

1855—President established Klamath River Reservation (Area Y-1) for the Yuroks.

1864—Congress authorized the President to establish "not exceeding four" reservations in California.

1864—Austin Wiley, Superintendent for Indian Affairs in California, negotiated and signed "treaty" with Hoopas, leading to "the Square" (Area H) as a reservation for the Hoopas.

1876—The President confirmed "the Square" as a reservation for the Hoopas.

1891—The President enlarged "the Square" to encompass the 1855 Klamath River Reservation, and a new "Connecting Strip" (Areas H, Y-1 and Y-2 respectively).

1892—Congress authorized allotment of Klamath River Reservation (Area Y-1) to the Indians residing thereon, and the sale of the balance to settlers, with proceeds to go to resident Indians (Yuroks).

1898—Executive action allotting the Connecting Strip (Area Y-2) to Indians residing thereon (Yuroks).

1922/1923—Executive action allotting the Square (Area H) to Indians resident thereon (Hoopas).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Hoopa Valley Tribe petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.[1]

OPINION BELOW

The opinion of the Court of Claims is reported as *Short* v. *United States*, 486 F.2d 561 (Ct.Cl. 1973). The opinion and findings of the court are reproduced as Appendix A to this petition.

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[1] On January 4, 1974, the United States filed an application for an extension of time of 30 days in which to file a petition for certiorari in this case (*United States* v. *Short*, No. A-663).

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the Hoopa Valley Tribe must surrender to a large group of Yurok Indians a controlling political and economic interest in the Hoopa Reservation (which was established in Hoopa aboriginal territory pursuant to an 1864 "Executive Treaty") merely because the Yuroks' own reservation was technically attached to the Hoopas' reservation by an 1891 Executive Order.

The decision reached below, over the objections of the Executive Branch, which recognizes the Hoopas exclusive rights to the area in dispute, so disarranges the relationship between two major Indian tribes and the United States, that the question deserves to be settled by the highest tribunal of the United States.

2. Whether it is tenable for the Court of Claims to say in one breath that the Hoopa Valley Reservation was created under such circumstances that no tribe could have vested rights in it, and in the next breath to say that the Yuroks are entitled to recover money damages from the United States for infringement of the same non-vested rights.

3. Whether the Court of Claims has jurisdiction to determine that a group of Indians is entitled to enrollment on an Indian reservation when the Secretary of the Interior has ruled, in his plenary discretion, that it is not so entitled.

STATUTES INVOLVED

The text of the Acts of April 8, 1864 (13 Stat. 39) and June 17, 1892 (27 Stat. 52) are set forth as Appendices B and C.

STATEMENT [2]

This is a dispute of fundamental proportions between the Hoopa Valley Tribe and a large number of Yurok Indians over whether the Hoopas must relinquish a controlling interest in their reservation to the Yuroks, members of an adjacent tribe which geographically and historically has been separate from the Hoopas.[3] The controversy has its roots in the Act of April 8, 1864 (13 Stat. 39), which authorized the President to establish "not exceeding four" Indian reservations in California on which all the Indians of the state were to be concentrated. In that same year Superintendent Austin Wiley negotiated an "Executive Treaty" with the Hoopa Indians and certain allies or subgroups of the Hoopas [4]

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[2] The general factual background involved in this case is set out at length in this Court's decision in *Mattz* v. *Arnett*, 412 U.S. 481 (1973) which is discussed *infra* at 12 n.36. References herein are to the findings of trial judge David Schwartz adopted by the Court of Claims in its opinion of October 17, 1973 (Appendix A) (hereinafter referred to as "App. A").

[3] Along with many modern Indian tribes the petitioner Hoopa Valley Tribe (referred to herein as the "Hoopas") is not ethnologically pure. Although "most" of its enrollees are Hoopa (App. A at 2) its tribal rolls include some descendants of other tribes who were the early allies of the Hoopa and who came to live in Hoopa territory. The roll even includes a small number of Indians of Yurok blood who became identified with the Square and accepted by the tribe through long time residence there (App. A at 90-92).

[4] The agreement was entitled "Treaty of peace and friendship between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians" (Appendix F). The other named tribal signatories have been identified as subgroups of the Hoopas, or closely allied ethnologically (South Fork: Def. Ex. 144-7

(not including the alien Yuroks) for the establishment of the "Hoopa Valley Reservation."[5] The boundaries of this 12 mile square reservation (Area H)[6] (hereinafter referred to as the "Square") were confirmed by President Grant by Executive Order of June 23, 1876, establishing a reservation of 89,572.43 acres.[7]

At an earlier time, in 1855, the Klamath River Reservation, (Area Y-1) located approximately 20 miles northwest of the Square, was established for the Yurok Indians.[8] After passage of the 1864 Act, the legal status of this area as a reservation was called into question because there were at least four other reservations in California aside from the Klamath River Reservation. It was argued that the continued existence of the Klamath

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at 130; Redwood: Def. Exs. 144-4 at 266-67, 144-7 at 128; Grouse Creek: Trial Transcript at 84, Def. Exs. 144-7 at 141, 144-11 at 492, 519).

Formal ratification was considered unnecessary (App. A at 23). Nevertheless, the provisions and intent of the "treaty" were approved by the Commissioner of Indian Affairs and Secretary of the Interior (App. A at 22-23), prompting Superintendent Wiley to declare thereafter by public notice that the treaty stipulations had been "confirmed" (App. A at 24). Most importantly, it is clear that the reservation was promised to the Hoopas and allied groups in order to secure their compliance with the dual objectives of the government's Indian policy, *i.e.*, the end of hostilities and the seclusion of the Indians within a tightly controlled environment (App. A at 23). History records that the proposed reservation was in fact established (App. A at 25-27), hostilities between the parties were terminated (App. A at 24), and the Hoopa Indians began to reside peacefully within the boundaries of the reservation pursuant to the terms of the treaty.

[5] The Court below found that the extreme northern edge of the reservation was the site of a Yurok aboriginal settlement (App. A at 15, 27). However, virtually all, if not all, of the reservation established was Hoopa aboriginal territory. *See* Trial Transcript at 161-166.

[6] This and all subsequent "Area" references are to the Map reproduced on the first page of this petition.

[7] App. A at 28-29.

[8] App. A at 14.

River Reservation was therefore inconsistent with the congressional declaration that only four reservations would be allowed.

Eventually a federal court ruled that the Klamath River had lost its status as a reservation.[9] This opened the Yuroks' land there to incursions of white settlers. Faced as well with numerous legislative proposals to sell the reservation to whites,[10] the President, in 1891, acting again by Executive Order,[11] settled the controversy over the status of the Klamath River Reservation by attaching it to the Hoopa Square, through the device of enlarging the boundaries of the Square to encompass not only the Klamath River Reservation itself (Area Y-1), but also a new twenty-mile "Connecting Strip" (Area Y-2) between the two reservations. The Connecting Strip, like the Klamath River Reservation, was an area of substantial Yurok settlement in the Yurok aboriginal area.[12]

This 1891 Executive Order did not define the nature of the rights of the respective tribes in the new tripartite reservation or even mention any tribe or Indian group as having rights.[13] However, a pattern of administrative actions emerged in which the resident Indians of the Klamath River Reservation (Area Y-1), the Connecting

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[9] *United States* v. *Forty-eight Pounds of Rising Star Tea*, 35 F. 403 (D.C.N.D. Cal. 1888), *aff'd*, 38 F. 400 (Cir. Ct. N.D. Cal. 1889).

[10] App. A at 36-45.

[11] Executive Order of October 16, 1891 (1 Kappler 815) (Appendix E).

[12] App. A at 36.

[13] In fact, the only document contemporaneous with the establishment or extension of the Hoopa Valley Reservation which provides for entitlement of specifically named Indian tribes is the Wiley "treaty" of 1864 (App. A at 21-22 and discussed in note 4, *supra*).

Strip (Area Y-2) and the Square (Area H) each retained exclusive substantive rights to their own particular subreservation.

Less than a year after the 1891 Executive Order, Congress itself treated the Yuroks living on the Klamath River Reservation (Area Y-1) as the exclusive owners thereof,[14] by granting allotments in that section exclusively to resident Indians (the Yuroks) and providing for sale of the remaining land to white settlers. Sale proceeds were to be used exclusively "for the maintenance and education of *the Indians now residing on said lands and their children*," *i.e.* the Yuroks. 27 Stat. 52, 53 (Emphasis supplied.) In 1893, under the Act, 161 allotments were made to the resident Yuroks, averaging 60 acres each.[15] Timber lands were allotted as well as agricultural land.[16]

In 1898 the Connecting Strip (Area Y-2) was likewise allotted to Indians who resided there—*i.e.* the Yuroks. Some 499 allotments were made, averaging 40 acres each,[17] including timber land as well as agricultural land.[18]

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[14] Act of June 17, 1892, 27 Stat. 52. (Appendix C).

[15] Of the allotments totalling approximately 10,000 acres, only two were made to Indians of Hoopa blood, and those allottees had resided on the Klamath River Reservation for many years prior to receiving their allotments (App. A at 56).

[16] The valuable nature of the timberland allotted to Indians of the Hoopa Extension (Areas Y-1 and Y-2) has received administrative recognition. *See* S. Rep. No. 278, 60th Cong., 1st Sess. 18 (1908).

[17] Of the allotments totalling approximately 20,000 acres, only two are known to have been made to Indians of Hoopa blood—both of whom had been residents of the Strip for "some years" prior to receiving the allotments (App. A at 58).

[18] *See* note 16, *supra*. At trial, a number of sample plaintiffs (Yurok Indians) testified that timber from allotments on the Hoopa Extension (Areas Y-1 and Y-2) was logged off at various times. Trial Transcript at 535, 545, 558, 564, 770.

Most of Areas Y-1 and Y-2 (which originally comprised 58,168 acres)[19] was disposed of to third parties[20] either directly by the Indians, or by the Secretary for the benefit of the Indians. In either case the Yuroks enjoyed all the proceeds.

Many years later, in 1922 and 1923, the pattern of granting exclusive allotments to resident Indians was similarly followed on the Square. However, the Indians of the Square, *i.e.* the Hoopas, received only 365 allotments of greatly reduced size, averaging only 8 acres each.[21] The large difference in size of allotments resulted from a decision *not to allot timber lands to the Hoopas on the Square*, and thus, large tracts of their timber land (the focus of the present controversy) remained in tribal ownership.[22]

In the mid-1950's commercial development of the unallotted timber on the Square started to generate substantial income[23] and the Yuroks desired to share in this income. However, in 1958 the Secretary of the Interior ruled that the unallotted resources of the Square

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[19] App. A at 31.

[20] Of the approximately 30,000 acres allotted to the individual Yuroks in Areas Y-1 and Y-2, the public records of the Bureau of Indian Affairs show that only 3,417.11 acres remain in Indian ownership. (*See* Bureau of Indian Affairs, Office of Economic Development, Real Estate Services, Real Property Management: *Annual Report on Indian Lands*, June 30, 1971, at 35 (relevant portions reproduced as Appendix H).

[21] App. A at 61. Of the 365 allotments made on the Square, 35 were made to non-Hoopas but the trial judge found that "[t]he non-Hoopas allotted on the Square were connected with the Square by residence there or by parentage, their parents having resided on the Square." App. A at 67.

[22] App. A at 59, 61.

[23] App. A at 97. The Yurok timberlands were marketable in an earlier day because located adjacent to the Klamath River (App. A at 37).

belonged exclusively to "members of the Hoopa Tribe of the original 12-mile square reservation and their descendants," and that the attachment of the Yurok areas (Y-1 and Y-2) to the Square was "technical" only, and did not make the Yuroks co-owners of the Square.[24]

The Yuroks brought suit in the Court of Claims and on May 22, 1972, the trial judge ruled that the 1891 Executive Order, which attached the Yurok areas (Y-1 and Y-2) to the Square, created a single indivisible reservation for the joint benefit of all Indians resident upon any of the three areas. Based upon his construction of the four reservation requirement of the 1864 Act, the trial judge reasoned that reservation status for the Klamath River Reservation and Connecting Strip could be achieved or maintained "only from a bona fide merger of the [Yurok] Addition into the reservation [Square], not a 'technical' joinder, 'for administration only' . . . ." [25] The Court of Claims, in a per curiam opinion adopting the trial judge's recommendations, ruled that, subject to further proceedings to determine individual rights, the Yuroks were entitled to judgment against the United States, equal to their aliquot share of the revenues derived from the tribal resources of the Square.[26]

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[24] App. A at 98. (The entire opinion of the Deputy Solicitor, 65 I.D. 59 (1958), is reproduced as Appendix G).

[25] App. A at 12.

[26] The court ruled that 22 of 26 "sample" plaintiffs were entitled to a recovery in amounts to be later determined. The cases of 3,301 other plaintiffs were set for further proceedings to determine basic entitlement. App. A at 13. If all plaintiffs prevail, the United States will be liable to pay the Yuroks approximately $16,000,000, based on population and total distributions to the Hoopa Valley Tribe since 1955. Even if only half of the plaintiffs prevail, their judgment would be in excess of $11,000,000.

REASONS FOR GRANTING THE WRIT

1. The ruling of the Court of Claims that the Hoopa Valley Tribe must relinquish a controlling interest in its ancestral homeland to a large group of Yurok Indians presents a question of substantial public importance uniquely appropriate for resolution by this Court. It is not just that the decision would affect the lives of several thousand individual Hoopa and Yurok Indians, compel the United States to pay the Yuroks a very substantial money judgment, and gravely disarrange the long-established relationship between two major American Indian tribes and the United States. What is uniquely important is that the decision will have the effect of divesting a major federally recognized American Indian tribe of control over its reservation and destroy its modern, vigorous tribal government,[27] something which, to our knowledge, has never yet been done by an American court.

In decreeing that the Yuroks jointly own the tribal lands of the Square the court below necessarily assured the Yuroks (who are already calling upon the Secretary of the Interior to dissolve the present Hoopa tribal government) a controlling voice in the administration of the Square. In the new tribal government which must follow if the Court of Claims decision becomes final, the majority voice will belong to the non-resident Yuroks who

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[27] The affairs of the Hoopa Valley Tribe are run by an elected Business Council (App. A at 87-88). Among many activities, the tribe runs a dental and health clinic (*Hearings Before a Subcomm. of the House Comm. on Appropriations* (Department of the Interior and Related Agencies Appropriations for 1974), 93d Cong., 1st Sess., pt. 6 at 348-353 (1973)), a scholarship program, a credit program, a housing construction program and a campground. It is in the process of developing a law and order system. The Yuroks, who are widely scattered, do not have a functioning tribal government (App. A at 84-85).

have already disposed of their lands[28] and who, today, far outnumber the Hoopas.[29] This poses a direct threat to the homes of many Hoopas[30] and even to the most important ceremonial place of the Hoopa religion, the "*Nin-A-San-Ne-A-Jed*", meaning the sacred "Center of the World," which is located on tribal land in the Square and would now be subject to the control of the alien Yurok majority.

To the Hoopas, the judicial taking of the last remnant of their ancestral homeland is a truly shattering injustice, and is directly contrary to the solemn promises made to their ancestors at the time the reservation was established.[31] While they know that the Yurok lands of the Addition were technically attached to the Square by the 1891 Executive Order, they also know that the resultant reservation was not administered as one joint reservation in which all resident Indians obtained equal rights in common. They know that pursuant to an 1892 Act of Congress,[32] the resident Yuroks of the old Klamath River Reservation (Area Y-1) received the proceeds of sale of the "surplus" land of the Klamath River Reservation

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[28] *See* note 20, *supra.*

[29] The Hoopa tribal roll contains 1,360 names. There are 3,323 Yuroks who are parties to this suit, and if even half of these are enrolled, they will control the future destiny of the Hoopa Valley Reservation (Area H) and the resident Hoopa Indians.

[30] Most Hoopas live by "assignments" on tribal land (App. A at 65-67). These assignments can be revoked at the pleasure of the tribe, and when the Yuroks control the new tribe, they may oust the Hoopa permittees and put their own "assignees" on the land.

[31] Whatever interpretation the Court of Claims now gives to the Wiley "treaty" of 1864 (Appendix F) the Hoopas know that it represented the government's sacred pledge to their ancestors that they would thereafter be entitled to retain their aboriginal homelands and the fruits of their labors in return for a termination of the Indian wars.

[32] Act of June 17, 1892 (27 Stat. 52).

as well as valuable allotments of timberland, averaging 60 acres each, which were not available to the Hoopas.[33] They know that, by Presidential directive[34] the Yurok residents of the Connecting Strip received allotments averaging 40 acres each, also of valuable timberland, which were not available to the Hoopas. They know that many years later small allotments averaging 8 acres each were made to some of the Hoopas of the Square and that the Bureau of Indian Affairs determined to deny allotments of timberland on the Square of the kind earlier granted to the Yuroks in their subreservations.[35]

The Hoopas know that this controversy would not have arisen if they had been given individual allotments of the timberland of the Square comparable to those obtained

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[33] As noted in *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973), Congress has repeatedly recognized the continued separate status of the Klamath River Reservation. *See* Act of December 24, 1942 (56 Stat. 1081) extending the trust period on "lands allotted to Indians of the Klamath River Reservation," and Act of May 19, 1958 (72 Stat. 121) restoring certain vacant lands to tribal ownership on the "Klamath River Reservation." *See also* Act of March 2, 1917 (39 Stat. 969) which detailed the kinds of expenditures which could be made for the residents of the Klamath River Reservation from the proceeds arising from the sale of surplus lands. *Compare Shoshone Tribe* v. *United States*, 299 U.S. 476, 487-490, 495 (1937), where the actions of the United States showed the contrary, *i.e.*, that it was intended by the administrators and ratified by Congress that the Arapahoe Indians should share jointly with the Shoshone Indians ownership of the Wind River Reservation.

[34] App. A at 53-54.

[35] The conclusions of the trial judge are directly contrary to this consistent pattern of administrative action and interpretation, and accord little, if any, significance to the approval of the Wiley "treaty" of 1864 by the Commissioner of Indian Affairs and the Secretary of the Interior (App. A at 23) and the clear and unequivocal opinion of the Deputy Solicitor in 1958, holding that petitioner was entitled to exclusive ownership of the Square's resources (App. A at 98; Appendix G). This approach violates the familiar principle that administrative interpretation, if reasonable, should be given great weight. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 18 (1965).

by the Yuroks in their areas since, in that case, there would be little or no tribal land left on the Square to tempt the Yuroks into disputing its ownership.

If, as we assert, the Court of Claims decision is wrong, a great injustice has been done which offends the important public policy that Indian tribes should be undisturbed in the sovereign possession of their lands. It seems unfair in the highest degree that the Hoopa Indians should be stripped of their patrimony on the basis of the opinion of a single trial judge without any articulation of the reasons for this result by the Court of Claims itself, assuming that meaningful consideration of the case was given by that court.[36]

As was expressly recognized in *Choctaw Nation* v. *United States*, 318 U.S. 423, 424 (1943), it is sufficient to invoke this Court's jurisdiction for a case to raise "important questions concerning the relations between the two tribes and the United States." Where, as here, there has been a judicial determination that an Indian tribe

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[36] Perhaps indicative is the Court of Claims' apparent misapplication of *Mattz* v. *Arnett*, 412 U.S. 481 (1973), where this Court ruled that the Klamath River Reservation was still in reseration status for the purpose of application of the California Fish and Game Code (412 U.S. at 506). While recognizing that the "ultimate issues in the two cases are different" the court below, without giving a clue as to its reasons, asserted that "several aspects" of the *Mattz* opinion "tend substantially toward supporting our holding in the present case." (App. A at 2). On the contrary, while the point did not crystalize in *Mattz*, this Court repeatedly there referred to the Klamath River Reservation as a *separate* entity and relied upon congressional and administrative interpretations which reconfirmed its continued *separate* existence (412 U.S. at 505). While this Court did determine (412 U.S. at 493) that the Klamath River Reservation became a part of the Hoopa Valley Reservation by virtue of the 1891 Executive Order (which we concede), this does not answer our argument that the joinder of the Klamath River Reservation to the Square was for administrative purposes only and was not intended to dilute the substantive property rights of the Hoopas in the Square or the Yuroks in their subreservations.

must surrender a controlling interest in its reservation lands to another tribe, a question is presented that is highly, if not uniquely, appropriate for resolution by this Court. *Cf. Chippewa Indians* v. *United States*, 301 U.S. 358 (1937).

2. The trial judge's decision rests partly upon his assumption that the four-reservation requirement of the 1864 Act was hard and fast,[37] which we believe is patently wrong,[38] and partly upon the view that the Hoopa Indians had no vested rights in the Square under the 1876 Executive Order, apparently because they owned by a mere Executive Order, not by treaty or statute.[39] However, the trial judge overlooked the fact that if the Hoopas of the Square never obtained vested rights to the Square under the 1876 Executive Order, because it was a mere Executive Order, *then it follows that the Yuroks of Areas Y-1 and Y-2 never obtained vested rights in the Square under the entirely parallel 1891*

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[37] App. A at 12.

[38] In point of fact, history shows that the four-reservation requirement of the 1864 Act was hopelessly impractical, and as a result, it was loosely interpreted. Prior to 1891, a series of Executive Orders created at least 22 reservations in southern California for various bands of Mission Indians. While each band obtained substantive rights in its own reserve (*see Cabazon Band of Mission Indians* v. *United States*, 21 Ind.Cl.Comm. 119 (1969) and *Apis* v. *United States*, 88 F. 931 (D.C.S.D. Cal. 1898)) these reserves were classified as one reservation—denominated the "Mission Reservation"—*for administrative purposes* (*see* various Executive Orders collected in 1 Kappler 819-824). By Executive Order of January 9, 1884 (1 Kappler 832), a fifth reservation, the Yuma, was created in California in addition to the Hoopa Valley, "Mission," Round Valley and Tule River Reservations.

[39] Although the trial judge did not say so expressly, he cited and relied repeatedly upon a number of cases which so hold: *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103 (1949); *Healing* v. *Jones*, 210 F.Supp. 125, 138, 153, 170 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963); *Crow Nation* v. *United States*, 81 Ct.Cl. 238, 278 (1935); (App. A at 6-7, 99).

Executive Order, and hence they can have no claim for compensation here. For their claim obviously presupposes that they have been denied their vested rights.

It was the trial judge's view that the President had plenary authority to authorize any California Indian tribe to "share in the benefits of the reservation." [40] If this is correct it will follow that large numbers of landless California Indians, such as the Karoks who live near the Hoopa reservation and who have been actively and unsuccessfully seeking a reservation of their own,[41] will apply for rights to remove to the Hoopa Valley Reservation under the authority of the 1864 statute, which has never been amended or repealed in pertinent part. If the Executive Branch had power in 1891 to dilute the Hoopas' interest in the Square with impunity, by granting substantive rights in the Square to the Yuroks, presumably that power still exists today.

This aspect of the court's decision not only affects the Hoopas and Yuroks but is important generally in the administration of Indian affairs, especially in California. The Round Valley and Tule River Reservations were established in California by Executive Orders as two of the four reservations authorized by the 1864 Act. Since these Executive Orders do not clearly define the identity of the Indians entitled to the reservations, there is reason to believe that the Indians of the Tule River and Round Valley Reserves may be threatened by other Indians claiming rights pursuant to the Court of Claims decision in this case.[42]

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[40] App. A at 99.

[41] *See Donahue* v. *Butz*, 363 F.Supp. 1316 (N.D. Cal. 1973).

[42] The Tule River Reserve was set aside for certain named bands and "other scattered bands of Indians in the State of California" (Executive Order of October 3, 1873, 1 Kappler 831). The Round Valley Reservation was also set aside as a reservation without spe-

3. Of great importance also is the question of the jurisdiction of the Court of Claims over matters which are clearly "political" and which have heretofore been within the province of the Legislative and Executive Branches of government.

It is well established that the power to determine membership in a tribal entity for the purpose of resolving entitlement to tribal property resides with Congress, or with the tribe. *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899); *Martinez* v. *Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957); *Cf. Slattery* v. *Arapahoe Tribal Council*, 453 F.2d 278 (10th Cir. 1971). The matter is left to the discretion of the Secretary of the Interior under 25 U.S.C. § 163 "where the question involved is the distribution of tribal funds and other property under the supervision and control of the federal government." *Martinez, supra*, at 920. This power has heretofore been exercised by the Secretary, in approving the constitution and bylaws of the Hoopa Valley Tribe,[43] in distributing per capita payments exclusively to enrolled members of that group,[44] and in expressly ruling that the Indians of the Addition (Areas Y-1 and Y-2) have no interest in the Square.[45]

Respondents contend that they need not be enrolled members of the Hoopa Valley Tribe in order to share in the resources of the Square. However, the instant controversy can only be settled by establishing definite criteria for membership in the group which was entitled to per capita distributions in the past and will be in the future. The regulation of such matters, which are highly

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cification of the bands who were to share (Executive Order of March 30, 1870, 1 Kappler 828).

[43] App. A at 89-90.

[44] App. A at 96-97.

[45] App. A at 98.

political and administrative in nature, is unquestionably "within the province of the legislative branch to determine," *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308 (1902), and not within the jurisdiction of the federal courts.

The Court of Claims has, in effect, created a new tribe, or at least an involuntary merger of two tribes, over the protests of the Secretary of the Interior and of the Hoopa Valley Tribe.[46] Further, in order to process the claims of thousands of Yuroks to enrollment in this new tribe, the court must establish the specific criteria (such as degree of Indian blood, birthplace, residence, etc.) for the membership of the new tribe. This is a usurpation of legislative and tribal power that is of potentially enormous significance to the administration of Indian affairs, and should not be allowed to stand.

The question whether tribal membership problems will now be made the subject of legal proceedings in court is a question of overriding importance to the Indian tribes of this nation and should be settled by this Court.[47]

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[46] Under the provisions of the Acts of May 17, 1882 (22 Stat. 68, 88) and July 4, 1884 (23 Stat. 76, 97) which are codified at 25 U.S.C. § 63, Congress expressly proscribed the consolidation of tribes residing on Executive Order reservations without obtaining the consent of the tribes to be affected thereby.

[47] In *Thompson* v. *Tonasket*, No. 72-1193 (9th Cir., November 2, 1973) and in *Laramie* v. *Nicholson*, No. 72-1264 (9th Cir., October 9, 1973), the United States Court of Appeals for the Ninth Circuit determined that the Indian Civil Rights Act gave the federal district courts jurisdiction to entertain a suit for enrollment based upon the assertion that the individual involved had been denied the equal protection of tribal law. An extension of time to February 20, 1974 in which to file petitions for certiorari in these cases was granted by Mr. Justice Douglas on December 11, 1973.

CONCLUSION

For the reasons stated, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Claims in *Short* v. *United States*, No. 102-63 (October 17, 1973).

Respectfully submitted,

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January, 1974

SUPREME COURT, U. S.
FILED
JAN 14

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE,
Petitioner,

v.

JESSIE SHORT, ET AL., and THE UNITED STATES,
Respondents.

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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In the United States Court of Claims

No. 102-63

(Decided October 17, 1973)

JESSIE SHORT, ET AL. v. THE UNITED STATES

Harold C. Faulkner, attorney of record, and *William C. Wunsch*, for plaintiff. *Wallace Sheehan* and *Faulkner, McComish & Wunsch*, of counsel.

Herbert Pittle, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

Jerry C. Straus, for Hoopa Valley Tribe, amicus curiae. *Wilkinson, Cragun & Barker, Angelo A. Iadarola, Richard A. Baenen* and *Alan I. Rubinstein*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KUNZIG and BENNETT, *Judges*.

OPINION

PER CURIAM: This case comes before the court on defendant's exceptions to a recommended decision filed May 22, 1972, by Trial Judge David Schwartz pursuant to Rule 134 (h). The court has considered the case on the briefs and oral arguments of counsel for the parties and the amicus curiae. The court agrees with the decision as hereinafter set forth, rejects the objections and exceptions of defendant and amicus, and hereby affirms and adopts the decision as the basis for its judgment in this case. Insofar as defendant and amicus curiae have presented arguments to the court which differ from those presented to the trial judge, the court has considered them but does not deem any change in the trial judge's

opinion or findings is called for. The court has, however, excised from the findings the trial judge's notes which he indicates were not intended as findings.

Subsequent to the trial judge's decision and the oral argument before the court, the Supreme Court decided *Mattz* v. *Arnett*, 412 U.S. —— (June 11, 1973). We consider the trial judge's opinion and findings, and our decision herein, to be fully consistent with the opinion and decision in that case. Although the ultimate issues in the two cases are different, several aspects of the Supreme Court's opinion tend substantially toward supporting our holding in the present case.

It is concluded, therefore, that certain of the plaintiffs are entitled to recover in amounts to be determined under Rule 131(c), and the claims of the others are set down for retrial, as provided in findings 217–218. The case is remanded to the trial judge for further proceedings. The motion of the Hoopa Valley Tribe to intervene is granted.

OPINION OF TRIAL JUDGE

SCHWARTZ, *Trial Judge:* In 1876 a 12-mile square tract of land in Northern California, on the last reach of the Trinity River before it joins the Klamath River, was set aside by order of President Grant as the Hoopa Valley Indian Reservation. Most but not all of the Indians of the tract, called the Square, were and have been Hoopa Indians. In 1891 President Harrison made an order extending the boundaries of the reservation to include an adjoining 1-mile wide strip of land on each side of the Klamath River, from the confluence of the two rivers to the ocean about 45 miles away (in consequence of which the reservation took on the shape of a square skillet with an extraordinarily long handle). Most of the Indians of the added tract, called the Addition, were and have been Yurok Indians, also known as Klamaths.

The Square is heavily timbered and in the last 20 years the timber on its unallotted trust-status lands has begun to produce revenues of about $1 million annually. These revenues, administered by the United States as trustee for the Indian beneficial owners, have been divided by the Secretary of the Interior exclusively among the persons on the official roll of

the Hoopa Valley Tribe, an organization created in 1950, whose membership rules limit enrollment to allottees of land on the Square, non-landholding "true" Hoopas voted upon by the Tribe, and long-time residents of the Square of a prescribed degree of Hoopa blood, descended from natives of the Square.

The plaintiffs are 3,323 Indians, in the main Yuroks of the Addition and their descendants, who are ineligible for membership in the Hoopa Valley Tribe and have thus been denied a share in the revenues from the Square. They bring this suit against the United States as their trustee for a money judgment for their alleged share in the timber income, claiming it as all-reservation property. The Hoopa Valley Tribe, in a sense the real party defendant, is present in the case as an amicus curiae aligned with the defendant; the position of the Government and the Tribe are identical and the two have filed joint briefs. (References to defendant or to the Government will therefore mean the Hoopa Valley Tribe as well.)

To simplify the litigation, the cases of 26 plaintiffs believed to be representative of the 3,323 were chosen for trial with the expectation that if the plaintiffs as a group were upheld on the common issue, resolution of the sample cases would develop standards by which the parties could dispose of many or most of the remaining cases. The first order of business is therefore the basic issue of whether the Indians of the Addition may be excluded from sharing in the revenues of the communal lands of the Square.

The history of the reservation may be succintly stated: It was established in 1864 pursuant to the Act of April 8, 1864, 13 Stat. 39, its boundaries were in 1865 provisionally determined to be what has since been called the Square, formally so defined by an order of President Grant in 1876 and extended to include the Addition by order of President Harrison in 1891. The act of 1864 is the basis of the claims of all parties. No claim is made of any title or right antedating or overriding the statute or the authority exercised thereunder.

The plaintiffs contend that as Indians of the Addition, they are entitled to share in the resources of the entire reservation, including the Square. The enlargement of the reserva-

tion in 1891 formed, they maintain, a single, integrated reservation to which all the Indians on both the Square and the Addition got equal rights in common. The contrary position of the Government is that the Square survived the enlargement of the reservation in 1891 as an entity whose resident Indians had vested substantive rights, exclusive as against the Indians of the Addition. The executive order of 1891, the Government says, joined the Square and the Addition for administrative purposes only, not for purposes of substantive rights, and without effect on already vested rights of the Indians of the Square, now organized as the Hoopa Valley Tribe. The controversy is decided here in favor of plaintiffs, for the reasons which follow.

On August 21, 1864, Austin Wiley, the federal Superintendent of Indian Affairs for California, in a public notice "located" a reservation, to be called the "Hoopa Valley Reservation," "situated" on the Trinity River in Klamath County.[1] A second notice in February of the following year defined the boundaries of the "Hoopa Reservation" as a square tract bisected by the last 12 miles of the Trinity River before its junction with the Klamath and extending 6 miles on each side of the Trinity.[2] Eleven years later, on June 23, 1876,

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[1] "By virtue of power vested in me by an act of Congress approved April 8, 1864, and acting under instructions from the Interior Department, dated at Washington City, D.C., April 26, 1864, concerning the location of four tracts of land for Indian reservations in the State of California, I do hereby proclaim and make known to all concerned that I have this day located an Indian reservation, to be known and called by the name and title of the Hoopa Valley Reservation, said reservation being situated on the Trinity River, in Klamath County, California, to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States. Settlers in Hoopa Valley are hereby notified not to make any further improvements upon their places, as they will be appraised and purchased as soon as the Interior Department may direct."

"AUSTIN WILEY,
"Superintendent Indian Affairs for the State of California
"FORT GASTON, CAL., *August 21, 1864*"

[2] *"To Whom It May Concern:*

"Be it known that by virtue of power vested in me by Act of Congress passed April 8th, 1864, and acting under instructions from the Department of the Interior, I have located and set aside for an Indian Reservation the following described tract of land to be known as the Hoopa Reservation: Beginning at a point where Trinity River flows into Hoopa Valley and following down said stream, extending six miles on each side thereof, to its junction with Klamath River, as will be more particularly described by a map of said Reservation.

"Notice is hereby given to all persons not to settle or improve upon said Indian Reservation excepting as the Agent in charge may permit and in no manner to trespass thereon or interfere therewith.

President Grant in an executive order precisely defined the "exterior boundaries" of the "Hoopa Valley Indian Reservation" in accordance with a survey, and declared that the 89572.43 acres embraced therein were "set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864." [3] The circumstances surrounding the establishment and enlargement of the reservation are described in the accompanying findings of fact.

Neither the public notices of 1864 and 1865 nor the executive order of 1876 mentioned any Indian tribe by name, nor intimated which tribes were occupying or were to occupy the reservation. In this they were consistent with the statute whose authority was being exercised, the Act of April 8, 1864, 13 Stat. 39. That act, cited by both public notices and by the executive order, authorized the President in his discretion to locate not more than four Indian reservations in California, at least one of them to be in the northern district of the state, of such extent as he deemed suitable for the accommodation of the Indians of the state, all without mention of any tribe by name.

Section 2 of the act read as follows (13 Stat. 40):

> Sec. 2. That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land,

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"Free transit through the Reservation will be permitted all travelers, packtrains and stock, subject to such restrictions as the local Agent may see proper to impose.

"AUSTIN WILEY,
"Supt. Ind. Aff's, Cal."

"HOOPA RESERVATION, CAL.
"February 18th 1865."

[3] "EXECUTIVE MANSION,
"June 23, 1876

"It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed, in 1875, by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: 'Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked 'H. V. R., No. 3'; thence south 17½ degrees west, 905.15 chains, to southeast corner of reservation; thence south 72½ degrees west, 480 chains, to the mouth of Trinity River,' be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (13 Stats., p. 39.)"

"U.S. GRANT"

> within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: *Provided*, That at least one of said tracts shall be located in what has heretofore been known as the northern district: * * * *And provided, further*, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended.

The powers conferred by this statute are to be construed in keeping with the broad connotations of the words employed: "at his discretion," "suitable extent," "accommodation of the Indians," "practicable" and "due regard." *South Puerto Rico Company Trading Corp.* v. *United States*, 167 Ct. Cl. 236, 260–61; 334 F. 2d 622, 631–32 (1964), *cert. denied*, 379 U.S. 964 (1965). It is not disputed that the President had complete discretion as to which tribes were to be located on any of the reservations. The number of the tribes to occupy a reservation was also a matter for Presidential decision. There were many Indian tribes in California; in the north, in the area of the Hoopas and the Yuroks, almost every river and creek had its own tribe. Since there were to be no more than four reservations in the state—less, if the President so decided—it was inevitable that each reservation could and almost certainly would be occupied by more than one tribe. How many tribes was left to the President; the President would in his discretion adjust the size of a reservation to the number of tribes and Indians to be accommodated.

Given such a statutory scheme, faithfully reflected by the omission of reference to any Indian tribe in the notices of 1864–65 and the executive order of 1876, the Hoopa Indians could get no vested or preferential rights to the Square from the fact alone of being the first or among the first to occupy

the Square with Presidential authority. The sequence in which tribes were authorized to occupy a reservation gave no rights. Any exercise of the President's discretion in favor of the Hoopas, in approving their residence on the reservation, gave the Hoopas no vested rights as against such other tribe as might be the beneficiary of a simultaneous or subsequent exercise of the President's discretion. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103 (1949); *Healing* v. *Jones*, 210 F. Supp. 125, 138, 153, 170 (D. Ariz. 1962), aff'd 373 U.S. 758 (1963); *Crow Nation* v. *United States*, 81 Ct. Cl. 238, 278 (1935).

It is claimed by defendant, however, that the Hoopas were the sole aboriginal occupants of the Square. The legal consequences were this claim upheld, as against the statute and the President's authority, need not be gone into, for the claim of fact is unfounded. The accompanying findings recount that the Hoopas shared the Square with at least some Yuroks, whose native villages ranged along the Klamath River from the ocean to the Trinity—the area later to become the Addition—to the banks of the Trinity near the Klamath. This conclusion of fact as to the presence of Yuroks on the Square prior to white settlement does not, of course, support the claim of the present plaintiff Yuroks of the Addition, who were not introduced into the reservation until 1891, but it does negate the claim of the defendant insofar as it is based upon original exclusive Hoopa occupancy of the Square.

Another contention is that vested rights in the Square were conferred upon the Hoopas under a treaty made by Wiley at the time he established the reservation in 1864. This treaty, which made peace with the Hoopas and several other tribes then at war with the United States, obligated the United States "to set aside for reservation purposes for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of Hoopa Valley, to be held and used for the sole benefit of the Indians whose names are hereunto affixed as the representatives of their tribes." It is conceded that this promise was not a treaty in the constitu-

tional sense. Its making was not authorized, and it was not ratified. Its text is found as an attachment to a report by Wiley printed in the annual report for 1864 of the Superintendent of Indian Affairs; it is there captioned "Treaty of peace and friendship between the United States government and the Hoopas, South Fork, Redwood, and Grouse Creek Indians."

Putting aside any question of the binding quality of this document, it is not properly to be read as having sought to restrict the President's discretion under the act of 1864 or to give rights in the reservation to some tribes and withhold them from others. Within the week of the making of the treaty, Wiley in his first public notice locating the "Hoopa Valley Reservation" described the reservation only as an "Indian reservation" without any reference to who should occupy it. In the setting in which the treaty was presented to the Indians who agreed to it, described in the accompanying findings, the treaty is properly to be construed as a promise to devote Hoopa Valley to an Indian reservation for those tribes that would cease their hostilities and live at peace with the United States. So understood, the Klamaths or Yuroks were among its beneficiaries, for they laid down their arms and thenceforth remained at peace with the United States. There is good ground for concluding that though the caption of the treaty did not mention the Klamaths (Yuroks) as original parties, they were entitled to its benefits as among the tribes to whom the treaty was in fact presented and who were thereby persuaded to lay down their arms.

It is perfectly plain that from the outset in 1864 all involved understood that the reservation was intended for an undetermined number of tribes including the Hoopas and the Klamaths, and that the authorities repeatedly acted on this assumption. Some Yuroks already lived in the Square in 1864 and others were soon settled there, according to the best data on the peoples of the reservation. Within a fortnight of his first notice locating the reservation, Wiley reported the precise names of the tribes occupying every reservation in California except the Hoopa Valley Reserva-

tion; the Hoopa Valley Reservation, he said, contained "Various tribes." Soon thereafter Hoopas, Klamaths, and Redwoods appear as residents of the reservation. Saiaz, Wiyot, Wylackie and Sinkyone Indians were moved to the reservation from elsewhere (and apparently did not remain, at least identifiably). In 1869 Wiley's successor had a plan (not executed, for reasons which do not appear) to move 1800 Klamath Indians to the reservation. The Klamath River Reservation (occupied by Yuroks and constituting the ocean end of what later became the addition to the Hoopa Valley Reservation) had been destroyed by flood in 1861, and efforts to resettle its Indians, Yuroks, had not been successful. The 1800 Klamaths were thus probably the forebears of the present plaintiffs.

The annual report of the Commissioner of Indian Affairs for 1872 stated that the Indians in the care of the agency at Hoopa Valley were the Humboldts (Wiyots and others), Hoonsoltons, Miscolts, Saiaz and several other bands, numbering 725. The reservation on the Trinity, the Commissioner said, "was set apart per act of April 8, 1864, for these and such other Indians in the northern part of the State as might be induced to settle there." And in the years between the executive orders of 1876 and 1891 the Commissioner's annual reports contained a table giving the names of the tribes "occupying or belonging" to the various reservations. For the Hoopa Valley Reservation, the tribal names given were Hunsatang, Hoopa, Klamath River, Redwood, Saiaz, Sermalton, Miskut and Tishtanatan. During all these years, therefore, it was well understood that the reservation contained several tribes and was intended for whatever tribes might be settled there by authority of the President.

When, therefore, President Harrison by executive order of October 16, 1891 extended the boundaries of the reservation to include the contiguous strip of land along the Klamath River, there were no vested rights to the Square incapable of divestment, or at least dilution, by a Presidential introduction of additional tribes into the reservation. There could be no such rights in view of the President's authority under the act of 1864 and the manner of its exercise to that time.

The terms of the executive order (text in the note [4]) described the reservation as created under the act of 1864, and "extended" its "limits" "so as to include" the tract since called the Addition. No qualification was imposed on the incorporation of the Addition into the reservation, except that tracts on the Addition privately owned under the land laws were "excluded from the reservation as hereby extended."

Such words in an executive order, in this respect no different than the statute by whose authority it was made, are "to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears (*Miller* v. *Robertson*, 266 U.S. 243, 250 (1924))." No reason to the contrary appearing, the order is to be given its natural effect of granting to the Indians of the Addition, as Indians of the enlarged reservation, rights in the reservation equally with the Indians of the Square.

The order has been held to be a lawful exercise of the President's "continuing authority," under the act of 1864, within his "large discretion" concerning the exercise of that authority, to "alter and enlarge" the reservation "from time to time in the light of experience." *Donnelly* v. *United States*, 228 U.S. 243, 256–57 (1913). The President had no less power to enlarge a reservation created under the act of 1864 than he had to locate it originally. Five prior Presidents—Presidents Grant, Hayes, Garfield, Arthur and Cleveland—the Supreme Court noted, had made similar orders, with respect to the reservations authorized by the act, "altering and enlarging the bounds of the reservations, restoring portions of their territory to the public domain, and abolishing reservations once made and establishing others in their stead; and in

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"EXECUTIVE MANSION, *October 16, 1891*"

[4] "It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean: Provided, however, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended."

"BENJ. HARRISON"

numerous instances Congress in effect ratified such action." *Donnelly* v. *United States*, *supra* at 258.

As already noted, the plain and natural consequence of the order was the creation of an enlarged, single reservation incorporating without distinction its added and original tracts upon which the Indians populating the newly-added lands should reside on an equal footing with the Indians theretofore resident upon it. This the President was as free to do under the reserved powers granted him by the act of 1864 as he had been free in the early years, without enlarging the reservation, to settle Redwoods, Saiaz and others and as he would have been free in 1869 to settle upon the reservation the Yuroks of the Klamath River Reservation. In introducing the Yuroks of the Addition into the enlarged reservation in 1891, on a basis of equality with their kinsmen and the several other tribes already there, the President was merely continuing to accommodate the tribes of the area in the Indian reservation in Northern California he had established under the act of 1864. Compare *Halbert* v. *United States*, 283 U.S. 753 (1931) and *Quinaielt Tribe* v. *United States*, 102 Ct. Cl. 822 (1945), on the President's power to enlarge a treaty reservation for the common benefit of the tribe originally settled there and tribes "in that locality."

Although the purpose of the executive branch in enlarging the reservation would seem to be apparent from the facts, the defendant reaches a different result entirely; it contends that the purpose of the executive order was to join the parts of the enlarged reservation only technically, for administrative purposes only, the Indians of each tract to retain their rights in their respective tracts. No hint of such a purpose appears on the face of the executive order. And no support for such purpose appears in the data said by defendant to prove it—the background and origins of the executive order and of legislation affecting the Klamath River Reservation, a part of the Addition. An exhaustive inquiry into the data, set out in detail in the accompanying findings, fails to reveal even a mention of such a purpose as defendant asserts, much less the compelling showing which would be required to curtail the ordinary consequences of the executive order.

The executive order originated in the Administration's

desire to give reservation status to the Connecting Strip and the Klamath River Reservation, the latter then recently held by the courts to be an abandoned Indian reservation and threatened by Congress with a bill for its public sale. The object was to provide the legal basis for expulsion of white traders from the area and for the allotment of land in severalty to the Indians of the area, under the General Indian Allotment Act of February 8, 1887 as amended (24 Stat. 388, 26 Stat. 794). Any qualification on the incorporation of the Addition into the reservation would have jeopardized the desired status, for only four reservations were permitted in California under the act of 1864 and four were already in existence. Full reservation status could come only from a bona fide merger of the Addition into the reservation, not a "technical" joinder, "for administration only," of a reservation with a dubious status to one of lawful status. In the enlarged reservation resulting from such a merger, there could be only equal rights for all Indians of the reservation.

Administrative opinions, in the years following the executive order of 1891, recognized both that a number of tribes including Klamaths, Hoopas and other tribes were entitled to rights on the reservation and, with pointed relevance to the instant case, that the Indians of the Addition and the Square were equal in respect to rights in the lands of the Square. These opinions are described in the accompanying findings. In one of them, in 1916, it was ruled that the Hoopas, Klamaths and several other tribes were entitled to rights on the reservation. In another, in 1933, it was determined that allotments of land on the Square should cease, and assignments of land contingent on cultivation be substituted, because, it was held, the Indians of the Addition and the Square were equally entitled to allotment of lands and there was insufficient land for all those entitled.

Defendant attacks these rulings as erroneous, as made by men of lesser rank and as covering only a short span of years. The rulings were sound, they were made by, among others, a Commissioner, a Chief Clerk of the Indian Office in 1916 (then the officer third in rank, next after the Assistant Commissioner), and they were made whenever there was need for them. No contrary ruling worth the mention was made in the Department of the Interior until the Secretary in 1955

began to pay the income from the Square to the Hoopa Valley Tribe and the Deputy Solicitor in 1958 wrote an opinion justifying the legality of his action. 65 Dec. Int. Dept. 59 (1958). That opinion is not supported by the defendant; the opinion does not reflect the facts found here, primarily the nonexclusive nature of the Hoopas' residence in the Square, and it proffers neither tangible support nor rational theoretical basis for its assertion that the executive order of 1891 was intended only for administrative convenience.

The baseless belief that the Indians of the Square had exclusive rights in the lands of the Square seems to have grown from the remoteness of the Addition from the Square, the roughness of the terrain of the former, and the different stock of their respective inhabitants. The error flowered during the inordinate delay—from 1894 to 1922—between the time of allotment of Addition lands and allotment of land on the Square. The Indians of the Square, deprived for so long of allotments, became understandably jealous and possessive for the entire Square.

The 1891 executive order, however, withstands all attacks. It was fully authorized by the act of 1864. No vested Indian rights in the Square existed, and the effect of the order was to enlarge both the area and the population of the reservation, without any limitation on the rights of all the Indians in the communal lands of the enlarged reservation.

Turning to the cases of the 26 individual plaintiffs, stated in detail to the findings, it appears that 22 of them, named in the accompanying ultimate findings and conclusions, are sufficiently proven to be Indians of the reservation to warrant a determination now that they are entitled to recover, in amounts to be calculated after all the 3,323 claims are tried and determined. In the cases of the remaining four, there are questions—of possible loss of reservation rights or of degree of Indian blood—as require that their cases be retried or rebriefed, as seems indicated in each case. With the common issue of exclusive right out of the way, the parties through their counsel will presumably be able to address themselves to the individual claims, and agree upon standards for the recognition of individual claims. There should be no reason to insist upon a formal appearance by each claimant in court. Sworn testimony may be given by affidavit or in the

equivalent of a deposition, followed by stipulation for judgment where no contest is planned.

FINDINGS OF FACT*

1855–64—The Klamath River Reservation

1. On November 16, 1855 the President directed that there be set aside in Northern California, as the Klamath River Reservation, "a strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River" for a distance of approximately 20 miles, not to exceed 25,000 acres.

The President acted pursuant to the Act of March 3, 1853 (10 Stat. 226, 238), as amended March 3, 1855 (10 Stat. 686, 699), which authorized the creation of seven military reservations in California or in the Territories of Utah and New Mexico.

2. In Northern California the Klamath River first flows southwest to its junction with the Trinity River (which flows north and is essentially a branch of the Klamath) and then, veering sharply to the northwest, continues to the ocean. The two rivers thus form a Y whose arms are the Klamath and whose trunk is the Trinity. The Klamath River Reservation, on the upper half of the Y's left arm, extended upstream, from the ocean, for half the distance of the left arm to about 25 miles from the junction of the two rivers.

3. At the time of its creation in 1855, the Klamath River Reservation was occupied by about 2,000 Indians of the Yurok tribe, also known as Klamaths.

"Klamath," the name also of a more northerly group of Indians in Oregon, is as used herein and in the documents considered herein the name of the Indians resident, generally speaking, in the basin of the Klamath River in Northern California.

4. The tribe of Klamaths living down river on the Klamath were the Yuroks. Yurok means down river. Those living up river (roughly speaking beyond the Trinity's junction with

*Findings are grouped and titled for convenience; neither placement nor title affects the findings, and a title does not necessarily describe all the findings which follow.

the Klamath) were the Karoks. Karok means up river. Sometimes Yuroks are called Lower Klamath Indians, the adjective "lower" meaning they live below the junction of the two rivers.

The Indian tribes of Northern California were not organized or large entities; Indians resident on a particular river or fork were a "tribe." Tribal names were often applied inexactly and usually meant only a place of residence. To call an Indian a "Hoopa" or a Trinity Indian meant he was an Indian resident in the valley of the Trinity called Hoopa. The names "Yurok" and "Karok," as seen above, also meant a place of residence.

"Hoopa" is used herein instead of its other forms, "Hupa" and "Hoopah." References to Hoopas and the Hoopa tribe should be distinguished from the membership of the Hoopa Valley Tribe, the amicus curiae, an organization created in 1950 with intricate membership rules.

5. The native villages of the Lower Klamaths or Yuroks were located on the Pacific coast from Wilson Creek, north of the mouth of the Klamath, to Little River, south of the Klamath, along the Klamath River from its mouth to Bluff Creek, located a short distance upstream from the Klamath-Trinity junction, and (of particular significance in this case) in the canyon of the Trinity River in the most northerly part of the river near the junction of the Trinity with the Klamath and in a village a small distance from the Trinity.

6. The native villages of the Upper Klamath Indians of Karoks were along the upper Klamath, from a point just above Bluff Creek, upstream to Indian Creek. Weitchpec, a village at the junction of the two rivers, is often treated as the dividing point, and is allotted to the Yuroks.

7. Following the creation of the Klamath River Reservation, Indians of other tribes were moved to the reservation, among them 500 Tolowa Indians brought in 1856 from their native territory on the Smith River near the Oregon border. By 1858, a large majority of these Tolowas returned to their former territory.

8. In 1861, the Klamath River Reservation was flooded, and nearly all the arable land was destroyed. The Superintendent and a number of the Indians of the reservation moved to the Smith River Indian Reserve on the Smith River

near the Oregon boundary. Since the Klamaths lived principally on the salmon in the river, a substantial or greater number of them refused to leave and remained in the area and in the area further up river. Many of those who moved to the Smith River Reservation soon or eventually returned to their former territory on the Klamath.

9. Because the following findings turn away from the Klamath River Reservation to the establishment of the Hoopa Valley Reservation and do not return to the Klamath River Reservation until 1891, a brief foresight is given: Those Indians who remained on the Klamath River Reservation eventually came under the supervision of the Indian Agency for the area, located at the Hoopa Valley Reservation on the Trinity River southward from its junction with the Klamath, after that reservation was provisionally located in 1864. Thereafter, in 1891, the Hoopa Valley Reservation was enlarged, by executive order, to include not only the Klamath River Reservation but the connecting strip of land along the Klamath River between the two reservations.

The Act of April 8, 1864

10. The Act of April 8, 1864 (13 Stat. 39), the source of all claims herein and of central importance in this case, authorized the President in his discretion to set aside "not exceeding four tracts of land" within the State of California, at least one of them to be in the northern district, "for the purposes of Indian reservations," to be located "as remote from white settlements as may be found practicable." The reservations were to be "of suitable extent for the accommodation of the Indians of said state" and they were to include, in the President's discretion, any existing Indian reservations, "enlarged to such an extent as in the opinion of the President may be necessary." The remaining several reservations in California were to be surveyed into lots and offered for public sale.

The text of the relevant portion of the Act is as follows (13 Stat. 40):

> Sec. 2. *And be it further enacted*, That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes

of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: *Provided*, That at least one of said tracts shall be located in what has heretofore been known as the northern district: *And provided, further*, That if it shall be found impracticable to establish the reservations herein contemplated without embracing improvements made within their limits by white persons lawfully there, the Secretary of the Interior is hereby authorized and empowered to contract for the purchase of such improvements, at a price not exceeding a fair valuation thereof, to be made under his direction. But no such contract shall be valid, nor any money paid thereon, until, upon a report of said contract and of said valuation to Congress, the same shall be approved and the money appropriated by law for that purpose: *And provided, further*, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent, as in the opinion of the President may be necessary, in order to its [sic] complete adaptation to the purposes for which it is intended.

Sec. 3. *And be it further enacted*, That the several Indian reservations in California which shall not be retained for the purposes of Indian reservations under the provisions of the preceding section of this act, shall, by the commissioner of the general land-office, under the direction of the Secretary of the Interior, be surveyed into lots or parcels of suitable size, and as far as practicable in conformity to the surveys of the public lands, which said lots shall, under his direction, be appraised by disinterested persons at their cash value, and shall thereupon, after due advertisement, as now provided by law in case of other public lands, be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry, according to such regulations as the Secretary of the Interior may prescribe: * * *

11. Shortly after the passage of the act, Austin Wiley, already in the service of the Indian Bureau in California, was appointed Superintendent of Indian Affairs for California and directed to give his immediate attention to the matter of the location of the four reservations authorized by the

act, so that the Department of the Interior could have the benefit of his judgment in making the locations.

First Location of a Reservation in Hoopa Valley

12. At that time a number of Indian tribes of Northern California had for some years been at war with the forces of the United States. Many Indians had been taken prisoner. Other warriors, headquartered in Hoopa Valley, were willing to surrender. On his appointment Wiley proceeded to Hoopa Valley, treated with the tribes there represented, and there located a reservation by the public notice set out in the following finding.

13. On August 21, 1864, Superintendent Wiley gave public notice that he had located an Indian reservation, to be known as the Hoopa Valley Reservation, on the Trinity River in Klamath County, California, the boundaries to be thereafter prescribed.

The notice in its entirety read as follows:

> By virtue of power vested in me by an act of Congress approved April 8, 1864, and acting under instructions from the Interior Department, dated at Washington city, D.C., April 26, 1864, concerning the location of four tracts of land for Indian reservations in the State of California, I do hereby proclaim and make known to all concerned that I have this day located an Indian reservation, to be known and called by the name and title of the Hoopa Valley Reservation, said reservation being situated on the Trinity river, in Klamath county, California, to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States.
>
> Settlers in Hoopa valley are hereby notified not to make any further improvements upon their places, as they will be appraised and purchased as soon as the Interior Department may direct.
>
> AUSTIN WILEY,
> *Sup't Indian Affairs for the State of California.*
> FORT GASTON, CAL., *August 21, 1864.*

14. The Klamath County of that day, in which the new reservation was located, has since been largely added to present-day Humboldt County. Irregularly shaped, it in-

cluded the area north and south of the Klamath above its junction with the Trinity and stretching eastward to the Salmon River, the area north and south of the Klamath below its junction with the Trinity to about the beginning of the Klamath River Reservation, and the territory contained within a line drawn along the Klamath for the extent of the Klamath River Reservation, then going southward along the coast to about the mouth of the Mad River, then going due eastward to about the southerly point of the Hoopa Valley Reservation and then, irregularly, going further east. See the map entitled *Colton's California*, published by J. H. Colton, 1864, available at the Library of Congress.

In terms of the Y mentioned above, Klamath County included the territory west of the left arm and trunk, to the ocean, the territory east of the right arm and trunk, to beyond the Salmon River, substantial territory north of the Y's right arm, and north of its left arm to the inland end of the Klamath River Reservation. The county thus included a great part of the native territory of the Klamath Indians (see findings 5, 6, *supra*).

The "Treaty" Made in Hoopa Valley in 1864

15. A "treaty" made by Wiley with the Indian tribes at the time he located the reservation appears as an attachment to a report Wiley wrote on August 29, 1864, some days after his public notice. The report and the attached documents are set out as they appear in the annual report of the Commissioner of Indian Affairs for 1864:

> OFFICE OF INDIAN AFFAIRS,
> *San Francisco, California, August* 29, 1864.
>
> SIR: On the 2d ultimo I informed you that I would start for the north for the purpose of making some kind of a settlement with the hostile Indians in the Humboldt military district. The headquarters for the Indians who have been engaged in the war in that portion of the State for five years past is Hoopa valley, on the Trinity river. I arrived there on the 10th ultimo, and found most of the hostile Indians in the valley, with their guns still in their hands, waiting my arrival.
>
> They had been induced to come in by the officers commanding the district, under promise of protection until

terms could be arranged; but so cunning were they, and so suspicious of white men, that they kept most of their guns hid, and were constantly on the alert, ready to break to the mountains in case any effort should be made to remove them to a reservation. They protest that they prefer death or starvation in the mountains to removal.

I found among the leaders, and those having the most influence, young men, those that I had known as boys, most of whom have had more or less experience among white men as packers, herdsmen, farmers, &c. They all speak English and are intelligent. They make dangerous enemies, but I have every reason to believe they will comply with every obligation they have subscribed to if I keep my faith with them. The old Indians used their influence against giving up guns, and protested that I would lie to them, as other agents had done; but the influence is now all in the hands of the younger or "second crop" Indians. They are the ones to be conciliated; peace with them secures peace with all. Enclosed you will find copy of a treaty I proposed, and which they finally accepted. From the 16th to the 21st they were busy in delivering up their guns and pistols, many of them being hid out miles from the valley. On the 22d I issued the notice marked B, called a meeting of the settlers, and made known to them what terms I had offered the Indians to secure peace. They were all well satisfied, with, perhaps, the exception of two or three whose associations have been exclusively among the Indians. Several of the settlers will leave their places this fall, trusting to the government to pay them for their improvements.

The title to the whole of the lands in the valley is vested in the government, and as the improvements only are to be purchased, a very large sum will not be required. A good flouring mill and a fine saw-mill are there. The valley is beautifully located, surrounded by high mountains, well watered, with land enough in cultivation to feed all the Indians that are there or that may come there. Trinity river affords them fish during the spring and fall season, and the mountains on either side abound with acorns, berries, seed, &c.

At present there are about six hundred Indians in the valley. I appointed L. C. Beckwith a temporary special agent there at the request of the Indians themselves. I authorized him to assist them in building new houses, (their old ones having been burned during the war,) and to incur such expense as was absolutely necessary in preparing shelter for them before winter set in.

Enclosed please find a rough sketch of the valley; which, without being accurate in detail, will give you

some idea of its situation and the location of the improvements.

I propose to take the whole of the valley and to the summit of the mountains on each side, which is about five miles. There are no improvements upon the proposed reservation excepting those within the valley.

I trust my action will be approved, and that no time will be lost by the department in having the improvements appraised. We shall want to commence ploughing there in November for our next year's crop, and the sooner the citizens and Indians know that the valley is to be the property of the latter, the better it will be for all concerned.

Soliciting your earliest attention to this matter, I remain, very respectfully, your obedient servant,

AUSTIN WILEY,
Superintendent of Indian Affairs, California.

Hon. WILLIAM P. DOLE,
Commissioner.

Treaty of peace and friendship between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians.

ARTICLE I.

Sec. 1. The United States government, through Austin Wiley, superintendent of Indian affairs for the State for California, by these presents doth agree and obligate itself to set aside for reservation purposes for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of Hoopa valley, to be held and used for the sole benefit of the Indians whose names are hereunto affixed as the representatives of their tribes.

Sec. 2. Said reservation shall include a sufficient area of the mountains on each side of the Trinity river as shall be necessary for hunting grounds, gathering berries, seeds, &c.

Sec. 3. The United States government shall provide suitable clothing and blankets for the men, women, and children, which shall be distributed each year by the agent in charge.

Sec. 4. Suitable instructions shall be given the squaws to enable them to make their own clothing, take proper

care of their children, and become generally efficient in household duties.

Sec. 5. An agent and a sufficient number of employes to instruct the Indians in farming and harvesting shall be appointed, to reside upon the reservation, and no other white men shall be permitted to reside upon said reservation, except such as are in the military service of the United States or employed in government service.

Sec. 6. A physician shall be appointed to reside upon the reservation, whose duty it shall be to minister to the wants of the sick and look to their health and comfort.

ARTICLE II.

Sec. 1. All Indians included among those subscribing to this treaty must obey all orders emanating from the agent in charge.

Sec. 2. No Indians belonging to either of the tribes herein enumerated shall go beyond the limits of said reservation without a written pass from the agent in charge. All so offending shall not be deemed friendly, and shall be hostile Indians.

Sec. 3. All Indians who have taken part in the war waged against the whites in this district for the past five years shall be forgiven and entitled to the same protection as those who have not been so engaged.

Sec. 4. All guns and pistols shall be delivered to the commanding officer at Fort Gaston, to be held in trust by him for the use and benefit of the Indians, to be used by them in hunting only, in such numbers and for such length of time as the agent may direct. All ammunition in their charge to be turned over to the agents and paid for at its actual value in Indian money.

INDIAN RESERVATION NOTICE.

[There followed the text of the notice of the location of the Hoopa Valley Reservation, which appears in finding 13, *supra*.]

16. Commissioner W. P. Dole responded to Wiley's letter (foregoing finding) on October 3, 1864 as follows:

DEPARTMENT OF THE INTERIOR,
Office Indian Affairs, October 3, 1864.

SIR: Your communication, dated August 29, 1864, enclosing a draught of the agreement made by you with the lately hostile Indians of the Trinity river, with the

sketch of the situation of and settlements in the Hoopa valley, and the notice issued by you to the settlers, under date of—, is received and duly considered.

From your description of the valley thus selected for a reservation, its fertility, and consequent capability to sustain the people proposed to be placed upon it, its isolation from the white settlements, and the willingness expressed by the Indians to acquiesce in the arrangements, and confine themselves to the locality selected, I am induced to approve of your action, and trust that great good will result to the Indians, as well as to the whites, by this close of an expensive course of hostilities, and the consequent concentration of the Indians at a point where they can be controlled, and where measures may be adopted to improve their condition. I return herewith a copy of the agreement, as forwarded by you, with certain additions, suggested by the Secretary of the Interior, the document in this amended form meeting with his approval.

The relations of the government of the United States to the Indians of California do not contemplate treaties with those Indians, to be submitted by the President to the Senate for confirmation; but as it is deemed advisable to have the chiefs and leading men of the tribes in question subscribe their hands to a document which shall fully commit them hereafter, you will, after explaining to them the nature of the additions or alterations now suggested, as being intended solely for their benefit, cause a copy to be signed by them, and forward it to this office.

* * * * *

The establishment of the Hoopa Valley reservation, if approved, of course contemplates the abandonment of that at Mendocino, as but four are authorized, and it is understood from your communication of later date than the one to which this is a special reply, that the Indians upon the latter reservation are to be removed this fall to Round valley.

You will please take special care in the description of the boundaries of the proposed reservation at Hoopa valley, so that its proper limits may be of record in this office and the General Land Office, when approved by the President of the United States.

Very respectfully, your obedient servant,

W. P. Dole, *Commissioner.*

Austin Wiley, Esq.,
Sup't Indian Affairs, San Francisco, California.

17. It is conceded that Wiley's "treaty" (finding 15, *supra*) was not ratified. (Even agreement is doubtful. No signatures

by Indians appear (foregoing finding), and it has not been shown that the Commissioner's desired amendments (foregoing finding) were ever made known to any Indians or approved by them. In a public notice, however, Wiley said that the treaty stipulations were "confirmed" on February 8, 1865.)

18. From Wiley's letters, reported in the Commissioner's report for 1864 (which is the "Indian Report, 1864" and the source of all the page references mentioned below), it appears that

(a) The Klamath Indians were among the Indians at war with the forces of the United States. ("[T]he Klamath and Hoopa or Trinity Indians were at war with the forces of the United States at the time of the passage of the act of 1864, and had been so for some years. Indian Report, 1864, pp. 123, 127, 130, 133, 134–138." *Donnelly* v. *United States*, 228 U.S. 243, 257 (1913).)

In one of Wiley's letters, he referred to the "Klamath, Redwood and Trinity Indians, with whom we are now at war." P. 125; see also pp. 120–21. In other letters he wrote of the war with the Indians of Humboldt, Klamath and Trinity counties (pp. 116, 130). The Indians of Klamath County were surely the Klamath Indians (see findings 3, 5, 6, 14, *supra*), and it therefore appears that Wiley doubly referred to the Klamath Indians, both as "Klamath" Indians and as the Indians of Klamath County.

(b) The warring Indians who had not been taken prisoner had made their headquarters in Hoopa Valley; they were ready to surrender. Pp. 130, 131, 133, 134.

(c) Wiley went to Hoopa Valley, treated with the various tribes be found there, persuaded them to accept his "treaty," established a reservation and thereby brought to an end the war with the Indians of Humboldt, Klamath and Trinity counties (pp. 116–117, 119), who, as noted above, included the Klamaths.

(d) From the foregoing it follows and is found that despite the caption of the "treaty," describing it as made with the "Hoopa, South Fork, Redwood, and Grouse Creek Indians" (finding 15, *supra*), the tribes with whom it was made included the Klamaths.

(e) A reservation to be shared by Hoopas and Klamaths was not an unfamiliar idea. A treaty concluded in 1851 with bands of Indians of those tribes (but not ratified) would have created such a reservation of a tract which in substantial part coincided with what eventually became the Hoopa Valley Reservation.

19. After 1864 the Klamaths lived in peace in and in the area of the Klamath River Reservation, in their villages on the Trinity near the Klamath, on the connecting strip of land between the two reservations, and elsewhere. It follows, therefore, that even if the Klamaths were not originally among the tribes with whom Wiley made his treaty, they availed themselves of its benefits within the intendment of its Article I, Section 1 (finding 15, *supra*), and thereby became entitled to its benefits.

20. With his letter annual report of September 1, 1864 Wiley enclosed a tabular "Report of Indians on the reservation within the California superintendency, September 1, 1864," containing the name of the reservation, names of tribes, and numbers of Indians, male, female and total. For each of the four reservations other than Hoopa Valley he listed the names of tribes occupying the reservation. For Hoopa Valley, he reported "Various tribes, about 600," giving no tribal names and no numbers for male and female.

1865—The 12-Mile Square as the Boundary of the Hoopa Valley Reservation

21. Wiley's first notice had given no hint of the size of the reservation he had "located"; the notice had said that the reservation, which he called the "Hoopa Valley Reservation," was "situated on the Trinity River, in Klamath county, California, to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President" (finding 13, *supra*).

Wiley's second public notice, on February 18, 1865, read as follows:

> *To Whom It May Concern:*
>
> Be it known that by virtue of power vested in me by Act of Congress passed April 8th, 1864, and acting under instructions from the Department of the Interior, I have

located and set aside for an Indian Reservation the following described tract of land to be known as the Hoopa Reservation: Beginning at a point where Trinity river flows into Hoopa valley and following down said stream, extending six miles on each side thereof, to its junction with Klamath river, as will be more particularly described by a map of said Reservation.

Notice is hereby given to all persons not to settle or improve upon said Indian Reservation excepting as the Agent in charge may permit, and in no manner to trespass thereon or interfere therewith.

Free transit through the Reservation will be permitted all travelers, packtrains and stock, subject to such restrictions as the local Agent may see proper to impose.

AUSTIN WILEY,
Sup't Ind. Aff's, Cal.

HOOPA RESERVATION, CAL.,
February 18th, 1865.

(No such map as is mentioned in this notice has been referred to by the parties.)

In the first notice (finding 13, *supra*) Wiley had called the reservation the "Hoopa Valley reservation." According to a letter he wrote (on August 2, 1864) about the time of the first notice (August 21, 1864) he was then thinking of an area about 5x2 miles. The valley is about 6 miles long and the canyon north of it is another 6 miles long. The treaty contemplated a reservation of the "whole of Hoopa valley." When, therefore, the public notice in 1865 described a reservation whose north-south dimension was the river from the beginning of the valley on the south to the junction with the Trinity on the north, the reservation was being doubled in size, in that dimension alone. And, significantly, the added area in the north—the canyon of the Trinity near the junction with the Klamath—was native territory of the Yuroks.

The Trinity River in the Hoopa Valley, described by Wiley in the foregoing notice as bisecting the reservation he located, flows north through the valley to the junction of the Trinity and the Klamath. The valley of the reservation was for a time thought of as 16 miles long, but was finally regarded as 12 miles in extent. Since the reservation was described as extending 6 miles on each side of the river, to the junction of the two rivers, the reservation formed a 12-mile

square bisected by the last 12 miles of the Trinity River, and was to be called the "Square" or the "12-mile Square."

The Square was centered on the trunk of the Y formed by the two rivers (finding 2, *supra*). Compared to the Square, the Klamath River Reservation was in terms of the Y a thickening of the upper half of the Y's left arm (finding 2, *supra*). Actually, the boundaries of the Klamath River Reservation zigzagged, following the river's turnings. Between the two reservations was non-reservation land and a stretch of the Klamath River about 25 miles long.

1864–1875—The Peoples of the Hoopa Valley Reservation

22. As of February 18, 1865, when Superintendent Wiley defined the boundaries of the Hoopa Valley Reservation (foregoing finding), there have been identified, among the "various tribes" resident there (finding 20, *supra*), a substantial number of the Hoopa tribe living in several villages in the Hoopa Valley proper, a smaller group of Lower Klamath or Yurok Indians living in a few villages in the northern and northwestern part of the tract and a number of Indians of the Redwood or Chilula tribe. (See findings 5, 20, *supra*.)

23. The native villages of the Hoopas were along the Trinity River in the Hoopa Valley, within the Square, and continuing upstream (south) to, at least, the Trinity's south fork, beyond and south of the Square.

24. The native villages of the Redwoods or Chilulas were elsewhere than on the Klamath or Trinity Rivers.

25. In 1865, Charles Maltby, the Superintendent of Indian Affairs, California, reported that it was expected that some 1,800 Klamath River Indians would move to the Hoopa Valley Reservation. The move did not take place.

26. Superintendent Maltby's report for 1865 states that the Hoopa Valley Reservation could support only the Indians living there at that time and "those that will probably come in from the vicinity."

27. A report of B. C. Whiting, Superintendent of Indian Affairs, California, to the Commissioner in 1868 stated that he was preparing a large number of Indian houses at Hoopa Valley for the Smith River Indians and such others as he could collect together.

28. (a) In 1869 more than 300 Indians were moved by the Superintendent to Hoopa Valley in the Hoopa Valley Reservation from the Smith River Reservation, terminated by statute. These Indians were of the Saiaz or Nongatl, the Wiyot, Wylackie and Sinkyone tribes. The native villages of these tribes were elsewhere than on the Klamath or Trinity Rivers.

(b) The report for 1872 by the Commissioner of Indian Affairs is revealing for its identification of the reservation with Indians generally in Northern California and its recognition of the varied tribes then on the reservation.

The report said:

> *Hoopa Valley agency.*—The Indians belonging to this agency are the Humboldts, Hoonsoltons, Miscolts, Siahs, and several other bands, numbering 725.
>
> A reservation was set apart per act of April 8, 1864, for these and such other Indians in the northern part of the State as might be induced to settle thereon. This reservation is situated in the northwestern part of the State, on both sides of the Trinity River, and contains 38,400 acres. * * *

Formal Location of the Reservation by Executive Order in 1876

29. Wiley's location of the reservation in 1865 was soon implemented by legislation for payment for the improvements made by settlers, but his action did not get Presidential confirmation for 11 years, until 1876.

By Executive Order of June 23, 1876, President Grant formally defined the boundaries of the Hoopa Valley Reservation as follows:

> It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed in 1875 by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: "Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked "H.V.R. No. 3"; thence south 17½° west, 905.15 chains, to southeast corner of the reservation; thence south 72½° west, 480 chains, to the mouth of Trinity River," be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the

land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (13 Stats. p. 39.)

The metes and bounds description of the reservation in this executive order encompassed substantially the same tract of land defined by Superintendent Wiley's more general description of February 18, 1865 (finding 21, *supra*), namely, an approximately 12-mile square tract bisected by a stretch of the Trinity River beginning at its junction with the Trinity River and continuing upstream for 12 miles for the extent of the Hoopa Valley.

Though the Commissioner in his letter of October 3, 1864 had cautioned Wiley to take special care in fixing the boundaries of the reservation "so that its proper limits may be of record in this office and the General Land Office, when approved by the President of the United States," the President's order is the first precise description of the reservation.

1876–1891—The Peoples of the Hoopa Valley Reservation

30. In 1875 and 1876, at about the time of the executive order formally defining the boundaries of the Hoopa Valley Reservation (preceding finding), there have been identified as living within the Hoopa Valley Reservation Indians the following tribes:

Tribe	1875	1876
Hoopas	571	511
Klamaths	43	44
Redwoods	46	12
Saiaz	56	13

31. From 1877 to 1891 there appeared in the annual reports of the Commissioner of Indian Affairs a schedule of all reservations listing, for each reservation among other things, "tribes occupying or belonging to the reservation." For the Hoopa Valley Reservation the tribes named were Hunsatang, Hoopa, Klamath River, Redwood, Saiaz, Sermalton, Miskut and Tishtanatan. The Hunsatang, Sermalton, Miskut and

Tishtanatan were regarded as "bands" of Hoopas, closely related to them.

32. In 1886 the Indians living on the Hoopa Valley Reservation included Hoopa, Yurok, Karok and Redwood Indians, according to the first census of the reservation, described below in finding 37.

The Enlargement of the Hoopa Valley Reservation by Executive Order in 1891

33. On October 16, 1891, by executive order, President Harrison extended the "Hoopa Valley Reservation" to include a tract "one mile in width on each side of the Klamath River" from the then northern boundary of the "Hoopa Valley reservation" to the Pacific Ocean:

> EXECUTIVE MANSION, *October 16, 1891.*
>
> It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean: *Provided, however*, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.
>
> BENJ. HARRISON.

34. President Harrison's order added to the Square the Klamath River Reservation, at the upper end of the Y's left arm (finding 22, *supra*), and the strip of land between the two reservations. The newly-added lands are herein called the "Addition."

The enlarged reservation consisted of the Addition, a tract 45 miles long x 2 miles wide, extending the length of the Y's entire left arm, joined to the 12-mile Square. The shape of the Addition and the Square combined was something like a square skillet with an extraordinarily long, thin handle.

In the enlarged reservation, the former Klamath River Reservation is herein called the "Lower Klamath Strip," and

the intermediate strip of land is called the "Connecting Strip."

The entire reservation as enlarged contained 147,740 acres, 25,000 in the Lower Klamath Strip, 33,168 acres in the Connecting Strip, and 89,572 acres in the Square.

Access of Addition and Square Indians to the Enlarged Reservation

35. After 1891 Indians living on the Addition freely fished and hunted and gathered basket materials on the Square, and Indians of the Square freely fished and gathered basket materials on the Addition. There is no evidence that this was not the case prior to 1891.

36. After 1891, Indians of the Addition attended the boarding school maintained by the Government at the Indian Agency at Hoopa, on the Square, and came for medical treatment to the Government hospital there. There is no evidence that this was not the case before 1891, and there is some evidence that Indians from elsewhere than the reservation also came to the hospital for medical treatment.

Censuses on the Hoopa Valley Reservation

37. The first census roll listing the individual Indians of the original Hoopa Valley Reservation was compiled in 1886 under the supervision of Superintendent Dougherty. It was prompted by the Act of July 4, 1884, 23 Stat. 98, which instituted a practice of the annual taking of a census of Indians upon reservations.

This first census roll was entitled "Census of the Different Ranches of the Hoopa Valley Indians." It (and all censuses until 1930) did not show the tribe of the listed Indian. However, the Indians listed included, in fact, members of the Yurok, Karok and Redwood tribes, as well as Hoopas.

38. The 1887 census on the Hoopa Valley Reservation was designated the "Census of the Hoopa Valley Tribe of Indians." In 1888 and 1889, the census was headed "Census of the Indians of the Hoopa Tribe." In 1890 it was on some pages headed "Census of Hoopa Valley Reservation Indians" and on others "Census of the Hoopa Indians."

The Indians listed in these censuses included members of

the Hoopa, Klamath River (Yurok and Karok) and Redwood tribes.

39. In 1892, the first year after the enlargement of the Hoopa Valley Reservation, and again in 1894, the reservation census was recorded in two parts. One part, variously called a census of the "Hoopa Indians of the Hoopa Valley Agency" and a census of the "Hoopa Valley Indians," listed the Indians on the Square, including the non-Hoopas resident there. The other part, called a census of the Klamath Indians of the Hoopa Valley Agency, listed the Indians on the Addition.

40. In 1893, and again in 1895, 1896, 1897, and 1899 (no census was taken in 1898; two were taken in 1899) only a census of the Indians on the Square was taken. In 1893 and 1899 it was called a census of the "Hoopa Indians," in the other years, a census of the "Hoopa Valley Indians." As before, it included the non-Hoopas on the Square.

41. The 1900 census of the Hoopa Valley Reservation intermingled in one list the Indians on the Square and on the Addition and was designated the "Census Roll of the Hoopa and Lower Klamath River Indians." These Indian names were as before not meant to be tribal but rather geographical; Karoks and Redwoods were included.

42. From 1901 through 1907, a census was taken only of the Indians on the Square. In these years the census was referred to as a "Census of the Hoopa Indians." As before, it listed Yuroks, Karoks and Redwoods in addition to Hoopas.

43. Beginning in 1910 and continuing each year through 1933, the census was recorded in three parts. One part was entitled "Census of the Hoopa Indians," another was the "Census of the Klamath River Indians of the Connecting Strip" and the third, "Census of the Lower Klamath River Indians." While most of those listed on the third part, "Census of the Lower Klamath River Indians," were of the Lower Klamath or Yurok tribe, the designation "Lower Klamath River Indians" did not refer to the Lower Klamath River or Yurok tribe as distinguished from the Upper Klamath River or Karok tribe, but rather meant the Indians on the Lower Klamath Strip. Most of those on the list entitled

"Census of the Klamath River Indians of the Connecting Strip" were Lower Klamath or Yurok Indians.

As before, the list entitled "Census of Hoopa Indians" listed the names of the Indians on the Square regardless of whether they were of the Hoopa, Yurok, Karok, Redwood or other blood.

44. Superintendent Keeley of the Hoopa Indian Agency wrote to the Commissioner on October 24, 1929 that it was meaningless to divide the Indians supervised by the Agency into Hoopas, Klamath River Indians, Lower Klamath Indians and the other tribes of whom census rolls were prepared annually:

> So far as these names are concerned and these divisions, they now mean nothing to us. At one time they possibly meant a division of the Indians so far as residence was concerned, but they have moved about so much and intermarried, and they have apparently been transferred at different times from one census to another until such division is absolutely worthless and confusing.
>
> They have lost tribal affiliation to such an extent that very few of them know what tribe they belong to, and if they name a tribe, it is, in fact not a tribe but a band of Indians named after some local name of a place where they once resided. This division has resulted in many duplications, we found when the enrollment of California Indians was made by Mr. John H. Anderson.
>
> I am now asking authority to revise this census and make up a new one, corrected in accordance with the affidavits furnished Mr. Anderson as to families, same to be a strictly alphabetical roll of the Indians under the jurisdiction of the Hoopa Valley Agency without the divisions noted above.

45. The census forms were revised for the year 1930 to include a space for designating the tribe of the individual to be listed, but the tripartite division was retained. The provision of a space for the tribe of the person listed did not appreciably improve the accuracy of the census as an indicator of tribal affiliation. Those listed on the part of the census entitled "Census of the Hoopa Indians" were nearly always designated as a member of the Hoopa tribe even though they were actually Lower Klamath (Yurok), Upper Klamath (Karok), Redwood Indians or of the blood of more

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than one tribe. The individuals on the part entitled "Census of the Klamath River Indians" were designated as members of the Klamath River tribe and those on the census part entitled "Census of the Lower Klamath River Indians" were designated as members of the Lower Klamath tribe.

46. Some censuses listed off-reservation people, with off-reservation addresses. From about 1930, inclusion in the census was based not on residence but upon a concept of enrollment on the reservation equivalent to entitlement to be regarded as a reservation Indian (see findings 199, 207, 211, *infra*).

47. On January 12, 1933 Special Agent Roblin reported that the census rolls of Klamath River and Lower Klamath River Indians were inextricably mixed. Intermarriage and changes of residence had resulted in changes of names from one roll to another. Some of the confusion came, he said, from the use of the words Lower Klamath, the name of the strip constituting the former Klamath River Reservation; the Indians themselves referred to all Indians living below a village near the junction of the Klamath and Trinity as "lower Klamaths," which would leave all of the original Klamath River Reservation and the Connecting Strip in "Lower Klamath" country. The text of the relevant "Note" to his letter is set out in finding 94, *infra*, in another connection.

48. The tripartite division of the roll was ended in 1933. From that year until the last complete reservation roll was compiled in 1940, the Hoopa Valley Reservation roll was in a single part. The Indians designated as of the Hoopa tribe and as of the Klamath River tribe were intermingled, the designation Lower Klamath was dropped entirely. The roll continued to designate nearly every Indian residing on the Square as of the Hoopa tribe whether or not he actually was of Hoopa blood. In a few instances, mixed-blooded Indians were designated as Hoopa-Klamaths. On the 1940 roll, the designation Yurok was substituted for Klamath River. No roll was compiled in 1941. In the years 1934, 1935, 1938, 1939 and 1942 only supplementary rolls were compiled. No rolls were compiled thereafter.

Background of the 1891 Executive Order and the Act of June 17, 1892

49. (a) For about 20 years prior to the 1891 executive order there had been repeated recommendations by various officers that a reservation be established along the Klamath River for the Indians living there or that the Hoopa Valley Reservation be enlarged to encompass parts or all of the land bordering on the Klamath to the Ocean. Some of these recommendations are described in the following subparagraphs.

(b) A report of Special Commissioner John V. Farwell to the Commissioner in 1871 urged that the efforts of the Government to civilize the Indians would be facilitated by the extension of the Hoopa Valley Reservation to the mouth of the Klamath River so as to include the Klamath Indians.

(c) The report of Superintendent of Indian Affairs, California, B. C. Whiting, for 1871 states: "I would therefore respectfully recommend that the Hoopa Reservation be so extended as to take the [Klamath] river and the land for 3 miles back upon both sides to the Pacific Ocean, and thereby include the Klamaths, without requiring any to remove, other than those who may prefer to live at Hoopa."

(d) A report of September 1, 1871 from D. H. Lowry, Indian Agent, Hoopa Valley Reservation, states his belief that the some 2,500 Indians along the Klamath are well disposed towards the whites, deserving of assistance and come to the reservation for help in respect of crops, farming implements and otherwise, which he is unable to provide as he would like to, and which he recommends be provided. "I would also recommend that all the lands lying along the Klamath River, from a point 2 miles above the mouth of the Trinity River, extending back to the summits of the mountains on either side, be annexed to the Hoopa reservation, and be declared a part of the same."

(e) The report of the Commissioner of Indian Affairs to the Secretary for 1872 states the recommendation of the Superintendent of Indian Affairs, California, that the Hoopa Valley Reservation be extended to include the Klamath Indians who lived adjacent to the reservation along the

banks of the Klamath and formerly belonged to the abandoned Klamath River Reservation.

(f) In 1885 Special Agent Paris H. Folsom conducted an investigation of apprehended troubles between whites and the approximately 200 Klamath Indians in 14 villages on the banks of the Klamath River between the Klamath River Reservation and the Hoopa Valley Reservation. He recommended that a 2-mile wide tract of land centering on the river between the two reservations be set aside for the sole use and possession of those Indians, and that the lands then be given in trust to the Indians. The Commissioner attached this report to his report to the Secretary for 1885, saying that he would make suitable recommendations for protection of the Indians in respect of their lands.

50. At the same time as these recommendations that a reservation be created along the Klamath, a movement was going on in Congress to open the lands of the Klamath River Reservation, as an abandoned reservation, to public entry and sale. The bills in Congress for this purpose, introduced from 1879 on, were steadily opposed by the Department of the Interior, which maintained that the Klamath River Reservation was not abandoned, was still in a state of reservation and that the homes of its Indians needed protection. The Department conditioned its willingness to agree to public sale on the bills being amended to protect the Indians by providing for the allotment of land to them in severalty, before public sale of the remaining lands.

51. The first bill for the public entry and sale of the Klamath River Reservation, in 1879, provided that the Klamath River Reservation "is hereby abolished" and directed the Secretary of the Interior to have the lands surveyed and opened to homestead, pre-emption entry and sale, "the same as other lands." S. Res. 34, 46th Cong., 1st Sess. (1879); 9 Cong. Rec. 1651 (1879).

52. No action having been taken on this bill, another, with the same provisions, was next introduced in 1880. 10 Cong. Rec. 286 (1880); H.R. 3454, 46th Cong., 2d Sess. (1880). The House committee report on this bill declared that the establishment of the reservation in 1855 had been a mistake and an injustice, because it blocked access of the adjoining lands to the river; that the reservation had been abandoned

after the flood of 1861, and that the Indians had been removed to Smith River and then to the Hoopa Valley Reservation "where they were permanently located." The report set out a letter from the Office of Indian Affairs in 1874, signed by Commissioner Shuter, stating that the flood in 1861 had rendered the reservation worthless and that the reservation "has not been used for any public purposes since the freshet referred to and the department has no claim upon it." H.R. Rep. No. 1354, *supra*, 2.

The report continued that white settlers had in reliance on this letter improved their homes and buildings but that nevertheless at the instance of the Department of the Interior in 1877 the War Department forced the settlers to leave the reservation; that the Indians now there did not belong there but belonged on the Hoopa Valley Reservation; that the area was extremely fertile and timbered and suitable for wine and fruit and timber-cutting, none of which could be developed because the reservation blocked access to the natural highway, the navigable Klamath River.

The report concluded (H.R. Rep. No. 1354, *supra*, 5):

> It is the opinion of the committee, after careful investigation, that the government can have no use for these lands as an Indian reservation. The Hoopah Reservation, to which the Indians were removed and settled upon after the freshet in 1862, is located but 15 miles from the abandoned Klamath Reservation, and is capable of sustaining many thousands more of Indians than are now located upon it. Why, then, should these lands in question be kept from settlement and improvement by white citizens who are eager to expend their labor and means in the development of their resources?
>
> If there be no use for this abandoned reserve for the purposes originally intended, the committee can see no valid reason why it should not be restored to the public domain, and again made free for the access of labor and capital of white settlers seeking homes and fields for their energy and enterprise. Entertaining this view, after an impartial and careful consideration of all the evidence submitted, they are constrained to report in favor of the measure, and they therefore return the bill to the House, with the recommendation that it pass.

The report did not mention (as appeared in a report in the next session) that the Indian Office opposed the bill. H.R. Rep. No. 1148, 47th Cong., 1st Sess. 1 (1882).

The bill as reported was recommitted and no further action was taken on it. 10 Cong. Rec. 3126 (1880).

53. An identical bill was introduced in the following Congress (H.R. 60, 47th Cong., 1st Sess. (1881)) and upon reference to the Office of Indian Affairs was there approved with an amendment providing for allotments to the Indians. 13 Cong. Rec. 90, 3414 (1882). Commissioner Hiram Price's letter of comment on the bill, dated March 24, 1882, stated (H.R. Rep. No. 1148, 47th Cong., 1st Sess. 2 (1882)):

> To return to the consideration of the bill: The lands embraced within the said reservation are not needed (as a reservation) for Indian purposes, but that the Indians residing thereon should be protected in the peaceful occupancy and enjoyment of their homes, to which they have become much attached, and where they have gained a livelihood unaided by the government for more than a quarter of a century, is certainly beyond dispute.
>
> In order to effect this, I have to recommend that a further provision be added to the bill, at the end thereof, in substance as follows:
>
> "That before any of the foregoing provisions except that authorizing and directing the Secretary of the Interior to have the lands embraced in said reservation surveyed, shall be held and deemed to be in effect, there shall be selected and allotted to each Indian belonging to and residing upon said reservation, lands within the limits of said reservation as follows:
>
> "To each head of family one quarter-section.
>
> "To each single person over eighteen years of age, one-eighth of a section.
>
> "To each person under eighteen years of age, one-sixteenth of a section."
>
> * * * * *
>
> With the amendment above proposed, I see no objection to the passage of the bill. * * *

The committee report also contained a letter dated September 26, 1881 from Lt. Gordon Winslow of the Army, the Acting Indian Agent. Lt. Winslow stated that a census of the Indians just taken under military auspices reflected the presence of 213 Indians on the Klamath River Reservation. The census, he said, was "as nearly accurate as it can well be"; his earlier report, in the same year, of 115 Indians was, he said, based on information from civilians "who are, I believe, somewhat inclined to lessen the number, thinking

doubtlessly that the smaller the number the greater the likelihood of its being thrown open to settlers."

The committee approved the bill with the amendment suggested by the Commissioner. No action, however, was taken by the House.

54. The next three bills, in 1883 and 1884, in the 48th Congress, acceded to the desires of the Interior Department. The bills assumed that the Klamath River Reservation was in existence and provided that allotments to the Indians should be made before the land was to be opened to white settlement as public land. H.R. 112, 48th Cong., 1st Sess (1883); H.R. 7505, 48th Cong., 1st Sess. (1884), reported by the Committee on Indian Affairs as a substitute for H.R. 112; S. 813, 48th Cong., 1st Sess. (1883). These bills "abolished" the Klamath River Reservation and directed that the lands embraced therein be surveyed and "made subject to homestead and pre-emption entry and sale the same as other public lands," with, however, a proviso that before this was done there should be allotted land in stated amounts to the Indians belonging to and residing within the reservation.

55. Perhaps encouraged by the prospects of these bills, the Indian Bureau in 1883 began the work of allotment of Klamath River Reservation land, and selections were made by the Indians under the supervision of the Agent at Hoopa Valley. (The allotments fell through, however, when the surveys were found to be erroneous and fraudulent.)

56. None of the three mentioned bills (finding 54, *supra*) was enacted. The report of the Comissioner of Indian Affairs for 1885 says that it is "presumed that they were not reached in the regular course of business before adjournment." The Commissioner added that:

> It is my intention to ask at an early day for legislation suitable to the wants of these Indians. They do not need all the lands at present reserved for their use, but they should be permanently settled, either individually or in small communities, and their lands secured to them by patent before any portion of their reservation is restored to the public domain.

57. On December 21, 1885 identical bills were introduced in the House, repeating the provisions of the three bills intro-

duced in 1883 and 1884 (finding 54, *supra*). H. R. 158 and 165, 49th Cong., 1st Sess. (1885); 17 Cong. Rec. 370 (1885). No action was taken.

58. The years 1886 through 1889 saw no further bills for the sale of the Klamath River Reservation. Other significant developments, however, occurred. Congress in 1887 passed an act providing generally for allotments of reservation land to Indians in severalty and the federal courts in 1888 ruled that the Klamath River Reservation did not have the legal status of an Indian reservation. Both developments are discussed in the immediately following findings.

59. The General Allotment Act of February 8, 1887 (24 Stat. 388) authorized the President to survey the lands of any Indian reservation created by treaty, statute or executive order and "to allot the lands in said reservation in severalty to any Indian located thereon." As soon amended by the Act of February 23, 1891 (26 Stat. 794) each Indian was to receive ⅛ of a section (or 80 acres), the acreage to be doubled in size where the land was valuable only for grazing.

60. A case now arose of a commercial fisherman named Hume who employed Indians to fish in the Klamath River within the boundaries of the Klamath River Reservation, and paid them with goods. The Department of Interior, desirous of protecting the reservation from such intrusions, caused the prosecution of a libel against his goods, for unlicensed trading in an "Indian reservation" or in "Indian country" in violation of R.S. § 2133, as amended July 31, 1882 (22 Stat. 179).

61. The Government's position was set out in detail in a letter of April 4, 1888 from Commissioner J. D. C. Atkins, which the United States Attorney presented to the district court on the hearing of the case. On a review of the history of the reservation, the Commissioner concluded that the Klamath River Reservation was regarded by the Department "as in a state of Indian reservation," under the supervision of the Hoopa Valley Indian Agency.

Commissioner Atkins quoted from a letter from Superintendent Wiley of January 19, 1865, in connection with the location of the reservation at Hoopa Valley, that it was his "present purpose" to locate the Indians then at Smith River "upon the land formerly occupied as an Indian reservation upon the Klamath River, and which was abandoned in 1861,

but is still reserved by the Government. The Hoopa Reservation will either be extended so as to cover this point, or it will be kept up as a station attached to that reservation and under the control of the same agent." Commissioner Atkins said that this letter showed that the plan of the Superintendent was to "annex the Old Klamath River Reservation (with which we are now especially concerned), to the new Hoopa Valley Reservation." "I find," he concluded, "that this office warmly commended and approved the superintendent's course."

The Commissioner also quoted from letters from former Commissioners to the Secretary of August 14, 1877 and March 8, 1878, stating that when the Agency at the Klamath River Reservation moved to the Smith River Indian Reserve and the Indians (with the exception of one band) refused to leave (finding 8, *supra*), "it was not deemed advisable to recommend its [the reservation's] restoration to the public domain," and that "In view of these facts the reservation should, in my opinion, be preserved intact until some measures are devised for the permanent settlement of these Indians."

62. The district court on June 7, 1888, nevertheless dismissed the libel, with an opinion holding that the Klamath River Reservation did not have the legal status of an Indian reservation, although, the court also held, the reservation was not open to public entry as public lands. The act of 1864 (finding 10, *supra*), the court held, had authorized the creation of four reservations; lands of old reservations not set apart within the four new reservations were under section 3 of the act not subject to the operation of the general land laws but reverted to the control of the Secretary of the Interior, for survey and sale at auction. The President, the court continued, had in various orders and modifications of orders exhausted his authority under the act by the creation of four reservations—the Tule River Reservation, the Hoopa Valley Reservation (as to which, the court said, a suggestion that it include the Klamath River Reservation was not adopted), the Round Valley Reservation and Reserves for Mission Indians—and the Klamath River Reservation not having been included in any of the four reservations, the lands of that reservation were under section 3 of the act

relinquished "for the purposes of Indian reservations," and came into the possession of the United States for the survey and sale provided for by that section. *United States* v. *Forty-Eight Pounds of Rising Star Tea etc.*, 35 Fed. 403 (D.C.N.D. Calif. 1888).

63. The Secretary of the Interior requested that the Attorney General appeal the foregoing decision of the district court. In the Secretary's annual report for 1888 he said that in order to protect the Indians, authority ought at once be given, during the pendency of the appeal "to set apart these lands as a reservation and thus remove all doubt."

64. On January 14, 1889, while the Hume case was pending on appeal, another bill was introduced in the House to open the Klamath River Reservation to public sale. H.R. 12104, 50th Cong., 2d Sess. (1889); 20 Cong. Rec. 756 (1889). Perhaps in response to the district court's ruling that the reservation had lost its status as an Indian reservation but had not become public land, rather having come into the possession of the United States, under the act of 1864, for the purposes of survey and sale, the bill provided that the reservation should be regarded for the purposes of the act as in a state of reservation within the meaning of the Genera' Allotment Act of 1887 (finding 59, *supra*), and lands should be allotted to the Indians pursuant to that act, before public sale took place. Further, that surplus lands after allotment, despite the contrary provisions of the General Allotment Act, would be deemed to be and held as public lands subject to the laws for the disposition of public lands.

No action was taken on the bill.

65. (a) Shortly thereafter, and while the Hume case was still pending on appeal, the Senate by resolution of February 13, 1889 (20 Cong. Rec. 1818 (1889)) directed that the Secretary of the Interior inform it as to what proceedings had been taken for the survey and sale of the Klamath Indian Reservation, presumably the survey and sale which the district court had held was now the province of the Secretary. The Secretary's response, in the form of letters from the Commissioners of Indian Affairs and the Land Office, was that no such proceedings had been taken, because the lands had been in a state of reservation continuously since 1864.

(b) The letter from Commissioner of Indian Affairs John H. Oberly, dated February 18, 1889, stated:

> In response to said resolution, I have to state that I am unable to discover from the records or correspondence of this office that any proceedings were ever had or contemplated by this Department for the survey and sale of said reservation under the provisions of the act aforesaid: on the contrary, it appears to have been the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained under said act, either to extend the Hoopa Valley Reservation (one of the reservations selected under the act), so as to include the Klamath River Reservation, or else keep it as a separate independent reservation, with a station or subagency there, to be under control of the agent at the Hoopa Valley Reservation, and the lands have been held in a state of reservation from that day to this.

(c) The letter from the Commissioner of the Land Office, dated February 28, 1889, advised that surveys of the Klamath River Reservation were made in 1882; that in a letter of April 4, 1883 to the Secretary, the Commissioner of Indian Affairs "recommended that allotments be made to the Klamath River Indians based upon the public surveys herein stated, and that the rest of the reservation be restored to the public domain"; that attempts were made in 1884 by the Indian Office to make allotments using the surveys made but that on examination the surveys were found to be irregular and fraudulent and the allotments made were recommended for cancellation by the Indian Commissioner; and, finally, that resurveys had been made and were still under examination.

66. On April 1, 1889, the circuit court affirmed the decision of the district court in the Hume case, under the same title, in 38 Fed. 400 (C.C.N.D. Calif. 1889). The opinion of the circuit court was essentially the same as that of the district court (38 Fed. 400–1):

> The president did thereafter [after the act of 1864] act from time to time, and he did set off four tracts in different parts of the state for the purposes provided for, and he did not include in any one of them the "Klamath Indian Reservation," theretofore set apart. In setting apart these four reservations without including the

> Klamath reservation, he necessarily exercised his discretion, and, by implication at least, excluded them. As they were not retained by the future and further action of the president "for the purposes of Indian reservations," "under the provisions of the preceding sections of this act," the reservation, by the terms of the act itself, abolished or abrogated the prior reservation. This necessarily follows from the provision requiring these lands not embraced in the reservations made by the action of the president under that act to be cut up into lots of suitable size and sold, as provided in the act.

67. In December 1889 and January 1890 identical bills introduced in the House and Senate provided, simply and without mention of allotments, that "all of the lands in what was the Klamath River Reservation" are "declared to be subject to settlement, entry, and purchase" under the land laws. H.R. 113, 51st Cong., 1st Sess. (1889); 21 Cong. Rec. 229 (1889); S. 2297, 51st Cong., 1st Sess. (1890); 21 Cong. Rec. 855 (1890).

The bills were opposed in a report by the Indian Office dated October 15, 1890 (described some months later in a letter of January 7, 1891 from Commissioner Morgan to the Secretary), recommending that the bill be amended to provide for allotments to the Indians under the General Allotment Act, the surplus unallotted lands to be restored to the public domain and the funds from the disposal of the lands to be put to the credit of the Klamath River Indians. With such a provision for allotments, the Indian Office said, it would not object to the sale of the surplus lands. Without it, the Office would "strenuously oppose" sale of the land:

> In no event should the bill under consideration, or any other like measure be adopted unless provision is made for the allotment of lands in severalty to the Indians and some means provided to enable them to get a start in agricultural pursuits, and for the education of their children. With such protection and assistance secured to them, this office would interpose no objection to the disposal of the surplus unallotted lands as provided in the bill under consideration. But it would feel bound to strenuously oppose any measure looking to the opening of the lands of said reservation to settlement or sale that did not secure to the Indians permanent title to their homes, which can best be done by allotting lands in severalty to them as hereinbefore recommended.

68. Amendment of the bill as urged by the Indian Office was emphatically rejected by the House Committee on Indian Affairs. On April 1, 1890 the Committee reported H.R. 113, still providing for public sale, but with an amendment affirmatively rejecting any allotments on the Klamath River Reservation. The amendment provided that the Indians on the Klamath River Reservation be removed to the Hoopa Valley Reservation and there allotted, and that the proceeds from the sale of the lands be a fund to be used by the Secretary of the Interior for the "*removal*, maintenance, and education" of the Indians residing on the lands and their children. (Emphasis added; H.R. Rep. No. 1176, 51st Cong., 1st Sess. 2 (1890).) In this form the bill passed in the House, in September, 1890 (21 Cong. Rec. 10702 (1890)) and in the Senate was referred to committee (21 Cong. Rec. 10740 (1890)). The Senate took no action, either on the bill as first introduced or as it passed in the House.

69. The passage of a bill so flatly rejecting allotment and providing for public sale spurred the Department of the Interior to action. On December 23, 1890 the Secretary suggested to the Commissioner of Indian Affairs that he "consider the question whether a reservation should not be made for the Klamath River Indians, * * * and if so, you will please prepare the proper description and orders for the purpose."

70. Commissioner Morgan responded promptly, on January 7, 1891, and at length. Reviewing the establishment of reservations in California under the act of 1864 (finding 10, *supra*), he raised a question as to whether four reservations were in fact established under that act. The Smith River Reservation, he said, was intended to be only temporary and the Tule River Reservation was simply leased and not set apart under the act. His implication was that, contrary to the premise of the decision in the Hume case (findings 62, 66, *supra*), the President had not exhausted his authority under the act of 1864 to create four reservations in California.

He also discussed the proposed legislation to sell publicly the lands of the Klamath River Reservation, and the opposition of the Department of the Interior unless the bill were amended to provide first for allotments of land thereon

to the Indians in severalty, and urged further efforts to cause the enactment of the legislation favored by the Department, i.e., for allotment of lands to the Indians resident there and sale of the surplus lands, with the proceeds to be used for the benefit of the Indians. As to non-reservation Klamath Indians, resident between the Hoopa Valley Reservation and the Klamath River Reservation, he noted and restated Agent Folsom's recommendation (finding 49(f), *supra*) that the connecting strip of land between the two reservations be set aside for Indian use.

He concluded by saying that he would prepare whatever papers were requested, but that he was not prepared to recommend the establishment of a new reservation unless the Klamath's reservation was endangered, in which case the Hoopa Valley Reservation should be extended along the Klamath to the ocean:

> * * * If it shall be found that by the decisions of the courts or through the failure of Congress to act, the Klamaths are likely to loose [sic] the reservation established in 1855, it may become expedient to extend the Hoopa Valley reservation so as to include lands on both sides of the Klamath River, two miles in width on each side, from that reservation to the mouth of the river.

71. The Secretary thereupon sought the opinion of Assistant Attorney General George H. Shields, assigned to the Department of the Interior. Mr. Shields' opinion, dated January 20, 1891, responded as well to inquiries put to him earlier. He considered three questions: (1) "whether the Department is authorized to cause the removal of intruders from said [Klamath River] reservation"; (2) "whether the lands within the limits of said reservation can be allotted to the Indians living upon them, as reservation Indians, or under the legislation providing for allotments to non-reservation Indians"; and (3) the Secretary's immediate question, "whether the Hoopa Valley Reservation may not 'be legally extended so as to cover the ground of the Klamath Reservation.'"

The opinion described the creation of the various reservations under the act of 1864, particularly pointing out that reservations had been created of noncontiguous parcels and

by orders and successive orders revoking and amending earlier orders and setting aside substituted lands as reservations, and continued:

> Three conclusions inevitably flow * * *: 1, that no formal order of the President retaining an existing reservation was deemed necessary, but its [the Tule River Reservation] actual retention by the officers of the Indian Bureau was sufficient to constitute it one of the four authorized reservations; 2, that contiguity was not an essential, but a reservation might be composed of several noncontiguous parcels of land; and, 3, that the Executive authority, in that respect, was not exhausted when once exercised in the setting apart of "four tracts" or parcels of land, as reservations; but that discretion continued, and yet exists, to change, add to, diminish or abolish reservations and establish others, as may seem most promotive of the public interests.
>
> In relation to the Klamath River reservation, as in that of the Round Valley, no formal or written order appears to have been issued for its retention. In both of these instances the Indian office retained possession and control of the former reservations, making no change in their condition, status or management, further than that they passed under control of the one State Superintendent as required by the act of 1864. The Indians remained in the occupation of both of these reservations, and yet so occupy them alone, except so far as that occupation may have been intruded upon by individual white men, under color of claims. Congress has made annual appropriations for support of the Indians on the Round Valley reservation, but none for those on Klamath, and for the all sufficient reason that the latter are self-supporting and have never cost the government a dollar in this respect.

Mr. Shields then turned to a detailed statement of the "special circumstances" showing, he believed, that the Department had retained the Klamath River Reservation under the act and that it was a part of the Hoopa Valley Reservation.

Among the circumstances he relied upon were the following:

(a) The letter of January 19, 1865 from Superintendent Wiley to the Commissioner, stating that it was his intention to extend the Hoopa Valley Reservation so as to include the Klamath River Reservation "or it will be kept up as a sta-

tion attached to that reservation and under control of the same agent" (finding 61, *supra*). This disposition, Mr. Shields noted, was approved by the Commissioner in his annual report for 1865.

(b) The Commissioner's letters of August 14, 1877 and March 8, 1878 to the Secretary, already quoted in finding 61, *supra*.

(c) The statement by the Secretary in his anual report for 1888 (at p. 76) that:

> Indians have continued to reside on the Klamath River lands, and those lands have been and are treated as in a state of reservation for Indian purposes, the jurisdiction is under the U.S. Indian agent for the Hoopa Valley agency.

(d) The rejection by the Commissioner in 1883 of an offer to lease the salmon fisheries of the Klamath River and to cut timber on its lands, with a statement that "The reservation is still in a state of Indian reservation, and must so remain, uninterfered with, until otherwise ordered by competent authority."

(e) The circumstances of the approval by the Secretary, in 1883, of a recommendation that allotments be made to the Indians of the Klamath River Reservation (see findings 55, 65(c), *supra*) and the circumstance that in the same year the Secretary, in an appeal in a Land Office proceeding involving the lands of the Klamath River Reservation (2 L.D. 460) had held that the lands were since the act of 1864 regarded as in reservation, noting that allotments had been made and that when the selections were all made he would consider the question of restoring the remainder to the public domain. The allotments which had been made were abandoned when the underlying survey was found to be erroneous and fraudulent. Another survey was made in 1886 and meanwhile land officers were instructed to permit no entries or filings on Indian lands.

Mr. Shields stressed that the Mission Reservation, created under the same act as that under which the Hoopa Valley Reservation was created, was in accordance with orders of four Presidents composed of 19 different noncontiguous parcels.

On the basis of the foregoing data and considerations, Mr. Shields gave his opinion that the Klamath River Reservation was part of the Hoopa Valley Reservation, one of the four reservations authorized by the act of 1864, and that intruders could therefore be removed. It followed, he said, that the Indians thereof could be allotted under the General Allotment Act of February 8, 1887 (finding 59, *supra*).

Mr. Shields then turned to the district court opinion in the Hume case, which he recognized to be contrary to his opinion, and a remedy for the defect the court had found in the status of the Klamath River Reservation. The opinion itself was distinguished as dictum; the decision was said to be correct for the reason that the Klamath was a navigable stream from which fishermen could not be excluded.

The principal reason underlying the district court's opinion was, in the view of the Assistant Attorney General, the absence of an executive order setting aside the reservation as part of the Hoopa Valley Reservation, an omission which could easily be supplied by an order, which the Assistant Attorney General held would be lawful, extending the Hoopa Valley Reservation to cover the area of the Klamath River Reservation:

> Judge Hoffman concedes that the lands in question are yet in reservation, though not for Indian purposes; that they constitute a reservation in fact, but not in law; and the principal reason why the legality is questioned appears to be because there was no formal executive order setting apart or retaining it as part of the Hoopa Valley reservation. This difficulty may yet be removed by the President issuing a formal order, out of abundant caution, setting apart the Klamath river reservation, under the act of 1864, as part of the Hoopa Valley reservation, or extending the lines of the latter reservation so as to include, within its boundaries, the land covered by the former reservation, and the intermediate lands, if the title to the last be yet in the United States. Such an order would be in accordance with the precedents in relation to the Tule river, Round Valley, and Mission reservations, the legality of which, as herein shown, has been repeatedly recognized by the legislative and executive branches of the government. I am therefore of the opinion that the Hoopa Valley reservation "may be legally extended, so as to cover the ground of the Klamath reservation."

72. On January 21, 1891, the day following Assistant Attorney General Shields' opinion to the Secretary, the Secretary requested the Commissioner to prepare the necessary orders for extension of the Hoopa Valley Reservation.

73. The response was delayed until May 5, 1891; Acting Commissioner Belt explained that the reason for the delay was that "a bill for the disposition of the Klamath reservation was pending, which it was thought might become a law with amendments satisfactory to the Department." (This was presumably a reference to possible Senate action on the bill passed in the House in September 1890 in the 51st Congress (finding 68, *supra*).) The response transmitted to the Secretary a draft of an executive order which provided for extending the Hoopa Valley Reservation to include a tract of land 1 mile in width on each side of the Klamath River from the present limits of the reservation to the Pacific Ocean. Acting Commissioner Belt implied that he had adopted the suggestion of the Assistant Attorney General—that an extension include the land between the two reservations—because of Agent Folsom's report on the Indians of the intermediate strip (finding 49(f), *supra*).

74. On October 12, 1891, Secretary Noble transmitted to the President, requesting his signature, a draft of the executive order extending the Hoopa Valley Reservation. Among the enclosures was Assistant Attorney General Shields' opinion (finding 71, *supra*), which, the Secretary said, contained a history of the reservation and "the reason for the issuance of an order in the premises."

75. Four days later, on October 16, 1891, President Harrison signed the executive order; its terms, set out in finding 33, *supra*, extended the boundaries of the the Hoopa Valley Reservation to include the Klamath River Reservation and the Connecting Strip between the two reservations.

76. Congressional proponents of public sale of the Klamath River Reservation did not cease their efforts on the issuance of the executive order incorporating the Klamath River Reservation into the Hoopa Valley Reservation. Either unaware of or indifferent to the executive order, they continued to press for the public sale of the lands of the Klamath River Reservation and, in the House, even to forbid allotment to the Indians thereof.

77. On January 5, 1892, 3 months after the executive order was signed on October 16, 1891 (finding 75, *supra*), H.R. 38 was introduced in the House, declaring that all of the lands embraced in "what was the Klamath River Reservation" were to be subject to settlement, entry and purchase, with a proviso that the proceeds of sale should be a fund used by the Secretary for the "removal, maintenance and education" of the resident Indians. H. R. 38, 52d Cong., 1st Sess. (1892); 23 Cong. Rec. 125 (1892).

The House committee reported the bill with only an amendment changing the last-quoted phrase to read "removal, maintenance *or* education." The committee report took the strong position that the reservation had been abandoned, as had been held by the federal courts, and that it was useless to allot any of its lands to the resident Indians, estimated by the report to be from 50 to 100 in number, because the Indians were "semicivilized, disinclined to labor, and have no conception of land values or desire to cultivate the soil"; that even if it were wise to allot lands to such Indians, these lands were unsuitable, whereas the nearby Hoopa Valley Reservation was adapted for allotments; and finally that while the Indians had not been cared for by the Government since 1861–62, the Government might hereafter desire to do so, and for this purpose the proceeds of the sale of the lands should be a fund, for their removal, maintenance and education. H. R. Rep. No. 161, 52d Cong., 1st Sess. (1892). No mention was made, in the report or in the brief debate in the House (see 23 Cong. Rec. 1599 (1892)), of any extension of the boundaries of the Hoopa Valley Reservation to include the Klamath River Reservation, of the Executive Order of October 16, 1891 effecting that extension, or of any recent change in the status of the Klamath River Reservation.

The bill as reported passed the House (23 Cong. Rec. 1599 (1892)) but in the Senate was stricken and another version substituted so as to delete the reference to removal of the Indians and to provide that before public sale, the lands should be allotted under the General Allotment Act of 1887 as amended. In this, the Senate Committee "had the recommendation of the Interior Department to draw the bill as it is reported." 23 Cong. Rec. 3918 (1892). As so amended the bill passed both House and Senate and became the Act of

June 17, 1892, 27 Stat. 52. Neither the brief debate nor the two conference reports contain any mention of an extension of the boundaries of the Hoopa Valley Reservation, the 1891 executive order or of any recent change in the status of the Klamath River Reservation. 23 Cong. Rec. 4225, 7771 (1892); 23 Cong. Rec. 3918–19 (1892). There was a reference in the Senate debate to a nearby reservation, doubtless the Hoopa Valley Reservation, "where these Indians [of the Klamath River Reservation] can go if they want to." 23 Cong. Rec. 3918, *supra*.

The proviso for allotments reads as follows (27 Stat. 52):

> *Provided*, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof:

With elimination of the word "removal," the last proviso, with respect to the proceeds of public sale, reads as follows 27 Stat. 53):

> *Provided further*, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Allotments on the Hoopa Valley Reservation

78. (a) At the time of the issuance of the Executive Order of October 16, 1891 extending the boundaries of the Hoopa Valley Reservation to include the Klamath River Reservation and the enactment of the Act of June 17, 1892 for allotment and public sale of the lands of the Klamath River Reservation, the situation as to allotments on the now three parts of the Hoopa Valley Reservation was as follows.

(b) On November 29, 1887, within the year of the enactment of the General Allotment Act of 1887 (finding 59,

supra), executive authority had been given for surveys preliminary to allotments in the Hoopa Valley Reservation, then consisting of the Square only. The survey was under way in 1889 and allotments were made temporarily until the survey could be completed.

(c) Preliminary work for allotments on the Klamath River Reservation had been begun in 1883 and fallen through (findings 55, 65(c) and 71, *supra*). Presidential authorization would be unnecessary for such allotments, for the act of 1892 (preceding finding) had supplied the requisite authority by its direction that allotments on those lands take place in accordance with the General Allotment Act.

(d) Presidential authority would be necessary for allotments on the Connecting Strip, land which had never before had reservation status. Such authority was soon supplied, and work on allotments on all three parts of the enlarged reservation continued and undertaken; it was executive policy to make the allotments on the reservation permitted by law (and in the case of the tract constituting the former Klamath River Reservation it was also the Congressional mandate).

79. The instructions to the allotting agents in the field, the accompanying departmental and Presidential correspondence, and the allotments made are the subjects of the following findings.

80. Allotments on the former Klamath River Reservation and the Connecting Strip were first brought up, after the enactment of the Act of June 17, 1892, by instructions proposed to be sent to the allotment agent. Such instructions were submitted for approval by Acting Commissioner Belt to Secretary Noble on September 23, 1892. The instructions are quoted in the finding next following, at the point of time when they were approved and dispatched.

On September 29, 1892 the Secretary reported to the President and requested authority for allotments on the Connecting Strip, as follows:

> By Executive Order of October 16, 1891, the limits of the Hoopa Valley Indian Reservation, in California, were extended so as to include a tract of country one mile in width on each side of the Klamath River and extending from the present limits of the said reservation to the Pacific Ocean.

By the Act of June 17, 1892 (Public No. 84), the lands in what was the Klamath River Reservation, in California, comprising a strip of country one mile in width on each side of the Klamath River commencing at the Pacific Ocean and extending up said river a distance of twenty miles, may be allotted and reserved as therein provided.

It is reported by the Commissioner of Indian Affairs that not more than forty allotments will be claimed by Indians who are residents on the original Klamath River Reservation, but that four hundred and seventy-five Indians reside on the strip of country between the two original reservations and on this strip there are several so-called Indian villages.

The Commissioner is of opinion that when the lands are allotted under the Act of June 17, 1892, allotments should also be made to the Indians on the strip.

Concurring in the views of the Commissioner, I have the honor to recommend that authority be granted for allotments in severalty under the Act of February 8, 1887, as amended by the Act of February 28, 1891, to the Indians on the strip of country added to the Hoopa Valley Indian Reservation in California by Executive Order of October 16, 1891, except that portion embraced within the original Klamath Reservation, on which allotments are authorized by the act referred to, and for the necessary surveys, and that your authority be endorsed hereon.

President Harrison approved, on September 30, 1892, by signing a memorandum presented by the Secretary reading "Relative to allotments to Indians located on strip of country added to Hoopa Valley Reservation, California, and for necessary surveys of same."

On October 8, 1892 the Secretary transmitted to the Commissioner the President's authorization, appointed Ambrose H. Hill "to make these allotments and also the allotments on the original Klamath River Reservation" and approved the draft instructions submitted to him on September 23 (*supra*), upon which the Commissioner sent the instructions to Mr. Hill.

81. The letter of instructions to Special Agent Hill of September 23, 1892, first dealt with the allotment of the lands of what was the Klamath River Reservation. The 1892 act was described; the agent was to advise the Indians of their opportunity and have them sign an application. The letter recognized explicitly the applicability to allotments of

both the General Allotment Act and the act of 1892, both generally and in the following paragraph:

> The allotments are to be made under the Act of February 8, 1887, "or any act amendatory thereto." Said Act has been amended by the Act of February 28, 1891. Under the former act as amended by the latter, each and every Indian located on the reservation, (Original Klamath River) is entitled to 80 acres of agricultural land, or a double quantity of grazing land. No Indian is entitled to an allotment unless he was located on said reservation on the 17th of June, 1892.

The letter of instructions then gave a series of detailed procedural rules for the making of allotments, and went on to the subject of allotments on the Connecting Strip.

82. In opening the discussion of the Connecting Strip the instructions mentioned the extension of limits of the Hoopa Valley Reservation by executive order of the prior year to include not only the "original Klamath River Reservation" but also the "connecting strip" of 2 miles centered on the river. Allotments to Indians on the Connecting Strip were, it was noted, not authorized by the Act of June 17, 1892, but were to be made by authority of the President under the General Allotment Act, the Act of February 8, 1887, as amended February 28, 1891:

> By an Executive Order, dated October 16, 1891, the limits of the Hoopa Valley Reservation were extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the limits of the Hoopa Valley Reservation, as then existing, to the Pacific Ocean, "Provided, however, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended"—This extension of the Hoopa Valley reservation included the original Klamath River reservation, the subject of the foregoing instructions and of the Act of June 17, 1892, and also a strip of country 1 mile in width on each side of the river, between the two reservations. This connecting strip is not included in the provisions of the Act, but the President has authorized allotments to be made to the Indians located thereon. As soon, therefore, as you complete the allotments on the original Klamath River Reservation you will proceed to make those on the connecting tract. Agent Beers reports that these Indians number some 475. Allot-

> ments should be made under the foregoing instructions except that as they are not required to apply for allotments, you need not have them sign an application. You will observe that tracts to which valid rights have attached are excepted from the reservation and are therefore not subject to allotment. I enclose for your information list of entries within the strip.

The "foregoing instructions," mentioned in the third-from-last quoted sentence, were a reference to the detailed procedural instructions earlier given for the making of allotments on the former Klamath River Reservation.

83. Hill proceeded to the reservation and on February 13, 1893 he submitted a schedule, approved on August 11, 1893, of 161 allotments of "lands allotted to Indians located on the Original Klamath River Reservation." The allotments varied widely in size, from 8 to 160 acres, averaging approximately 60 acres each, to a total of 9,762 acres. Of the 161 allottees, two are known to have been Indians of Hoopa blood who had resided on the lands of the original Klamath River Reservation for many years prior to receiving their allotments.

84. In February, 1894, Charles W. Turpin succeeded Hill and undertook the completion of allotments on the Connecting Strip.

The instructions to Turpin, from Acting Commissioner Frank C. Armstrong, dated February 21, 1894, in relevant part read as follows:

> Having been assigned to the duty of allotting lands to the Indians of the Hoopa Valley Reservation in California, the following instructions are given for your guidance.
>
> By an Executive Order, dated October 16, 1891, the limits of the Hoopa Valley Reservation were extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the limits of the Hoopa Valley Reservation, as then existing, to the Pacific Ocean, "Provided, however, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended." This extension of the Hoopa Valley Reservation included the original Klamath River Reservation, (which extended up the Klamath River one

mile in width on each side for a distance of twenty miles) and also a strip of country one mile in width on each side of the river between the Klamath River and the Hoopa Valley Reservations.

The allotments on the Klamath River Reservation have all been made and approved.

On the connecting strip Special Agent Hill has made 246 allotments and submitted duplicate schedules thereof to this office.

* * * * *

Your first duty will be to complete the work of making allotments on this connecting strip, of which Special Agent Hill reports that some 12 miles, on which are located about 125 Indians, remains to be allotted.

Allotments on this strip were authorized by the President September 30, 1892. They are to be made under the Act of February 8, 1887, as amended by the act of February 28, 1891, by which every Indian located on the reservation is entitled to 80 acres of agricultural or a double quantity of grazing land. Special Agent Hill however found it impracticable in very many cases to give the Indians, or to induce them to take, anywhere near the quantity of land allowed by the act. You will endeavor to allot them the full quantity where practicable, and where not, give them as much as they desire within the limit—much of the land is understood to be of no value to them.

* * * * *

3. Selection for orphans will be made by yourself and the Agent in charge of the Hoopa Valley Agency.

* * * * *

5. The tracts given to each allottee should ordinarily be contiguous, but he may be allowed to select detached tracts if necessary, in order to give him a proper proportion of agricultural land, wood and water privileges. Forty acre tracts of agricultural land may be divided into fractional parts of 20, 10, 5, or 2½ acres if necessary to secure to each family a due proportion of agricultural land.

6. Each Indian should be allowed to select his land so as to retain any improvements made by him. . . .

7. A description of the tracts to which valid rights had attached at the date of the Executive Order of October 16, 1891, was forwarded to Special Agent Hill March 14, 1893.

* * * * *

> Further instructions will be given you in regard to the allotment on the original Hoopa Valley Reservation.
>
> * * * * *
>
> Upon receipt of these instructions you will proceed to the Hoopa Valley Agency and reservation for the purpose of making the allotments thereunder.
>
> * * * * *
>
> I enclose copy of the act of February 8, 1887, and also of act of February 28, 1891.

85. Hill completed the allotments on the Connecting Strip in the year of his appointment, 1894, with the submission of a schedule of 253 allotments.

The Hill schedule was approved on June 23, 1898, and the Turpin schedule (with two exceptions) on June 27, 1898. The total almost 500 allotments varied in size from 5 to 160 acres and averaged approximately 40 acres each.

Two of these allottees are known to have been of Hoopa blood. They had been residents of the Connecting Strip for some years.

86. Surveys for allotments on the Square, begun (finding 78(b), *supra*) when the reservation consisted only of the Square, were completed on February 21, 1894, and the Commissioner then recommended that the authority of the President, necessary under the General Allotment Act, be obtained for the making of allotments. Acting Secretary Hines on February 23, 1894, requested Presidential authorization "for the making of allotments on the Hoopa Valley Reservation" under the General Allotment Act, and the President having on March 9, 1894 signed an order reading "Relating to the allotment of lands on the Hoopa Valley Reservation, California," the authorization was on March 12, 1894 transmitted to the Commissioner, who transmitted instructions to Special Agent Turpin on December 18, 1894.

87. The instructions of December 18, 1894 to Special Agent Turpin, after reciting the President's authorization for allotment of lands, stated:

> This reservation was established by the executive orders of November 16, 1855 and June 23, 1876 and embraces some 89,572 acres, the number of Indians located thereon being estimated at 475. The greater portion of the land is not susceptible of cultivation. In fact it is

doubtful if there is over 3500 acres of arable land in the reservation.

Reference was made to a body of arable land located remotely on the reservation, not yet surveyed: a road to this land was under construction. Turpin was to survey this land and to make allotment of the lands already surveyed.

The instructions recognized that lands in the valley proper would be insufficient for full-sized allotments to those who might be entitled, and it was suggested that 5 or 10 acres of the available valley land be alloted, each Indian being allowed to retain his improvements, and that the allotments be filled out with lands "in other parts of the reservation":

> With regard to the lands in the Hoopa Valley you will consult freely and fully with Capt. Dougherty, and endeavor to satisfactorily adjust the holdings of the Indians to the surveyed lines. The lands in this valley should be divided as equitably as possible among the Indians located thereon, each Indian being allowed to retain his improvements. It is not expected that these lands can be allotted in full quantity, but those in possession may be given 5 or 10 acres, and more in cases where they have improved the same if it can be done without injustice to others. Capt. Dougherty is thoroughly familiar with the situation and will doubtless cheerfully aid you in this work. As far as practicable the allottees should be allowed to fill out their allotments by taking the balance in other parts of the reservation.
>
> In other respects you will be governed by the instructions given you February 21, 1894, for your guidance in making allotments on the addition to the Hoopa Valley Reservation.

88. In 1896, Turpin proposed about 395 partial allotments on the Square of small tracts of about 5 acres of agricultural land, most of them in the valley proper. Grazing and timber lands were not allotted, and the Commissioner reported that further surveys would be necessary before the allotments could be completed.

Years passed, however, and the schedule of allotments was not approved because "many of the selections were described by metes and bounds and further surveys were necessary."

A new survey was made in 1915, and was approved in 1917.

89. On June 19, 1916, an ad hoc council of Indians, convened to pass on the applications of Indians from off the

reservation for enrollment on the reservation with a view to obtaining allotments, petitioned the Commissioner, urging that outsiders, and particularly Klamaths, not be recognized as having any rights to the lands of the reservation (by which they meant the Square), which they wanted kept for members of the Hoopa Tribe alone.

The directions of the Indian Office to convene the council are the subject of finding 102, *infra*, and the council's place in the history of tribal organization is the subject of finding 110, *infra*. The letter is set out here, for its relevance to the subject of allotments:

> We, the members of the Hoopa Indian Council, representing the tribes of Klamath, Redwood, and the other tribes that come under the Hoopas, do hereby write a few lines in explanation of certain conditions existing on the Hoopa Reservation in regard to the allotments that are now pending. In the first place there are Indians living on the Reservation that we think have no tribal rights here, they having no Hoopa blood in their veins. And besides these there are a great many outside Indians that want to get land here. There are certain tribes that are regarded as having tribal rights on the Hoopa reservation. This we cannot understand. Take the Klamath for instance—they represent a different tribe, talk a different language, and have never associated with the Hoopas to amount to anything. As near as we can understand the Hoopa and Klamath River reservation were allotted twenty some odd years ago. The Klamath are to-day enjoying the rights of their allotments, own their land and homes. While the Hoopas have had their land resurveyed and now are waiting to receive their allotments and are still uncertain about our land, and still they say we are linked with the other tribes. Surely there must be a mistake somewhere. This we would like to have looked into and corrected. We as members of the Hoopa Indian Council, knowing the real conditions that exist on the Hoopa Reservation, do hereby say that taking all things into consideration—the amount of land—the number of real Hoopa Indians, that members of the Hoopa tribe as an average are having a hard time to make a living on the land they are now working. And to crowd us still closer would be reducing some to poverty. This we do not wish to see, as we are looking forward to the future. To you therefore, the Commissioner of Indian affairs, we ask to do all in your power to have the Hoopa Reservation set aside for the members of the Hoopa tribe, that

they may get enough land to make a living on. All we ask is to be given an equal chance.

90. On July 17, 1918, pursuant to the new survey (finding 88, *supra*) Superintendent Mortsolf was instructed to make allotments in the Hoopa valley proper and in the grassland area of the Square known as Bald Hills. There were about 1600 acres of arable land in the valley and 2000 acres of grazing land in Bald Hills. (The rest was largely timberland, the source of the present controversy.)

On March 2, 1922, and July 25, 1923, there were approved 365 allotments in the valley and at Bald Hills, listed on an original and three supplementary schedules, designated A, B and C, submitted by Superintendent Mortsolf. The allotments were small, averaging 8 acres.

A Mortsolf Schedule D of 38 allotments, submitted on December 10, 1921, and a Schedule E of three additional allotments, submitted on February 12, 1924, were not approved because they had not been surveyed.

There the matter rested for almost 10 years, until 1932.

91. On November 2, 1932, Commissioner Rhoads directed Special Allotting Agent Charles E. Roblin to proceed to the Hoopa Valley Agency to confer with Superintendent Boggess concerning the making of further allotments on the Square and a general study of the allotment situation there.

Agent Roblin made a first report by letter of November 19, 1932 in which he concurred in a recommendation of the Forest Service that land covered by forest or heavy brush or otherwise rendered unusable for agricultural or grazing purposes should be retained as tribal land. Such lands, he wrote, constituted a "very large percentage" of the reservation lands: there remained for allotment only a "very limited area" of agricultural land and other land which might profitably be used by individuals, the majority of the suitable lands having been disposed of by the 365 allotments made in 1922 and 1923. These former allotments he described as "apparently provided for the Indians of the Hoopa Valley Reservation, California, who were then entitled to lands in allotment by reason of use and occupancy, under instructions theretofore issued."

92. Roblin dwelt in detail on the large number of possible

claimants, estimating that 600 Indians of those on the Connecting Strip and the Square would probably seek allotments:

> The Hoopa Agency census rolls for 1932 show the following numbers of persons:
>
> | | |
> |---|---|
> | Hoopa Valley (original Hoopa Valley Reservation) | 561 |
> | Klamath River (original twenty mile strip from Pacific Ocean, along Klamath River) | 608 |
> | Lower Klamath (Connecting strip along Klamath River, between original Klamath River Reservation and original Hoopa Valley Reservation) | 373 |
> | Total | 1,542 |
>
> Of these persons it is probable that only those of the the original Hoopa Valley Reservation and of the connecting strip will desire allotments on the Hoopa Valley Reservation. These total 934. The available record does disclose how many of these are without allotments; but, as the original allotment rolls covered only 365 allottees, and as a certain proportion of these are now deceased and so not now on the census rolls, a conservative estimate would indicate that at least 600 of those now on the rolls are unallotted.

93. Assistant Commissioner Scattergood acknowledged Roblin's report on December 13, 1932. Noting that on some reservations the Indians, rather than receiving allotments, had received assignments by which the occupant was permitted to live upon and improve a tract as if it were his own so long as he made beneficial use of the land, Scattergood requested Roblin's views on the advisability of making assignments rather than allotments on the Square.

Roblin responded by letter of January 12, 1933, in which he recommended that the persons named on Mortsolf's Schedules D and E (finding 90, *supra*) should have those tracts allotted to them, and that claimants whose selections covered land which would not require supplemental surveys should have that land allotted to them, provided their "enrollment on the Hoopa Valley Agency rolls has been regular and they are entitled to allotment," but that the lands which would require supplemental surveys if allotted and certain other lands surveyed but selected by children born subsequent to a certain date should be as assigned rather than allotted. This letter was "read and approved" by Superintendent O. M. Boggess.

94. In his letter of December 13, 1932 Scattergood had also asked Roblin for details of the cases of 125 Indians whose claims to an allotment, Roblin had reported, were in doubt. Scattergood asked on what the claims were based and why their rights were considered doubtful.

Roblin replied, in his letter of January 12, 1933 (a letter which as noted was read and approved by Superintendent Boggess) as follows:

> In my report of November 19, 1932, (L–A, 50666–32), I reported that selections had been filed by or on behalf of 125 persons whose right to allotment "is in doubt"; and the Office requests information as to the basis of these claims and "why the right to allotment is considered as in doubt". A check of the annual census reports for 1932 shows that all these claimants are carried on the rolls at Hoopa Valley Agency, either as "Hoopa" Indians, "Klamath River" Indians, or as "Lower Klamath" Indians. The Lower Klamath Indians are those living on or belonging with those who were allotted on the "Klamath River" reservation created November 16, 1855, extending for a width of one mile on each side of the Klamath River for a distance of twenty miles up from the mouth of that river. The unallotted portion of that reservation was returned to the public domain under authority of the Act of Congress approved June 17, 1892. The Hoopa Indians are those living on or belonging with the Indians of the "Hoopa Valley" reservation created August 21, 1864 and confirmed by Executive Order of June 23, 1876 in compliance with the Act of Congress approved April 8, 1864. The Klamath River Indians are those living on or belonging with the Indians of the Addition to the Hoopa Valley Reservation created by Executive Order of October 16, 1891, which addition is a strip extending for a width of one mile on each side of the Klamath River for a distance of approximately twenty-seven miles down that river from the northern boundary of the original Hoopa Valley reservation to join the original Klamath River reservation. This is generally known as the "connecting strip". See note, page 6.
>
> Under date of July 8, 1930 (L–A, 32789–30), the Office advised the superintendent of the Hoopa Valley Agency that the Hoopa Valley Reservation "was created under the authority contained in the act of April 8, 1864 (13 Stats., 39–40), for the accommodation of the Indians of the State of California, and was intended to include both branches of the Klamath River tribe", and that the

so-called connecting strip "is considered merely to be an addition to the Hoopa Valley Reservation".

The doubt as to the allotment rights of the 125 claimants mentioned seems to be very indefinite, and based largely on a desire of the Hoopa Indians to exclude the Klamath River and Lower Klamath Indians from allotment on the original Hoopa Valley Reservation, and also on a desire of the Hoopa Valley Agency officials to limit as far as possible the number of additional allotments to be made. This list also includes most of those who have heretofore been allotted field or grazing allotments and are now asking for "house lots" or additional areas of one sort or another. Two of these have received patents in fee for their original allotments, have sold them, now find themselves without title to any land on the reservation in their own right, and are applying for house lots or other land for themselves. These should probably be denied.

The rights of some are questioned because they were not living on the reservation when allotments were made in 1917 and 1918, but have moved onto the reservation since to secure better school facilities or some other advantage.

However, all these applicants are on the Hoopa Valley Agency rolls and are carried on the annual census reports; and as the Hoopa Valley Reservation was created as one of several reservations to be set apart for the "Indians of California", it is my opinion that the objection to the rights of these claimants, *as a class*, should be disregarded. In some few cases the objections may be substantiated by an investigation which would result in striking the names from the official rolls; but these cases would be very few.

* * * * *

[p. 6] Note. Page 1. The statement made by me on page 1 of this letter as to the status of "Klamath River" and "Lower Klamath" Indians, is not in accord with the statement in the fourth paragraph of page 1 of my letter of November 19, 1932, (L–A, 50666–32). I am advised that these two census rolls are inextricably mixed; that some years ago it frequently happened that Indians were changed from one roll to another by reason of intermarriage between Indians of the different rolls, or by reason of change of residence from one part of the Klamath country to another part. Some of this confusion seems to arise because the Klamath Indians themselves have a custom of designating all Indians living below a certain point on the Klamath River as "lower Klamaths", and those living above that point as "upper Klamaths". This point seems to be above the village

of Weitchepec; and this would leave all of the original Klamath River Reservation and all of the connecting strip or Hoopa Valley Addition in the "Lower Klamath" country. However that may be, the Indians of the "Klamath River" and "Lower Klamath" census rolls are equally entitled to rights on the Hoopa Valley Reservation and on the addition thereto.

The officials of the Hoppa Valley Agency realize that these rolls are not accurate and that they cannot be accurately reconciled without a field census being taken. They desire that such a census be authorized.

95. Roblin's recommendations with respect to the D and E schedules and to assignment rather than allotment were approved by the Commissioner on February 20, 1933.

96. By letter of February 20, 1933, Commissioner Charles J. Rhoads advised Superintendent Boggess that approval of the Mortsolf D and E schedules would be given. No further allotments would, however, thereafter be made, he wrote, because Indians of the Connecting Strip and the Lower Klamath Strip (which he called the "former Klamath River Reservation") would all be equally entitled to allotment on the Square (which he termed the "original Hoopa Valley Reservation"), and the available agricultural and grassland would be sufficient for so small a number of those qualified as to work injustice. The land would rather be assigned to those who would engage in actual beneficial use.

The relevant portion of his letter reads as follows:

> We have come to the conclusion that allotment schedules "D" and "E", referred to by Mr. Roblin in his letter of January 12, 1933, which were submitted several years ago but which were not then approved because of the need for additional surveys, should now be brought up to date and submitted for further consideration. * * * We feel that these unallotted qualified Indians have the strongest claims to allotments of any of the Indians on the reservation.
>
> We do not believe that further allotments should be made after the schedules referred to have been approved. *Indians of the "Connecting Strip" and of the former Klamath River Reservation would be entitled to allotments equally with those living on the original Hoopa Valley Reservation*, and it clearly appears from the reports that there would only be sufficient agricultural and grazing land on the reservation to allot a very small proportion of these Indians. Hence, it would be prac-

tically impossible to determine which Indians should be given and which denied allotments so as not to work an injustice upon certain individuals.

* * * * * * * * * * * We believe it would be better to leave the lands in their present status, and assign the remaining unallotted agricultural and grazing lands to individuals who actually wish to make beneficial use thereof.

For the reasons given after the schedules refered to above are approved, no further allotments at Hoopa Valley will be made at this time. [Emphasis added.]

Assignments were thereafter made, pursuant to Commissioner Rhoads' foregoing decision.

97. Most of the allotments on Mortsolf's Schedules D and E were thereafter, in 1933, approved; a few were delayed, for reasons not material, until 1950.

98. The Indian Reorganization Act of June 18, 1934 (48 Stat. 984) provided, *inter alia*, if the Indians of a reservation so voted, for an end to any allotments of Indian land in severalty, for continuation of any restrictions on alienation on any Indian lands and for the restoration to tribal ownership of any remaining surplus lands of any Indian reservation.

Section 18 of the act provided in pertinent part as follows (48 Stat. 988):

> This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application * * *.

Two elections were held on the Hoopa Valley Reservation, one for the Klamaths and one for the Hoopas. In a letter of October 20, 1934 Commissioner Collier advised the District Coordinator for the Reorganization Act that Superintendent Boggess was authorized to hold separate elections for the Hoopas and for the Klamath Indians, as follows (65 Dec. Int. Dept. 59, 68)

> Superintendent Boggess is authorized to hold two separate elections on the Hoopa Valley Reservation, one of them on Hoopa Valley proper for the Hoopa, and another election on the territory occupied by the Klamath Indians, when the Secretary calls such election.

In both elections, held December 15, 1934, the vote was overwhelmingly against the applicability of the act.

99. All told, assignments of land on the Square were made to nineteen Indians, known to be non-Hoopas, of the Lower Klamath or Yurok tribe and of the Upper Klamath or Karok tribe.

100. (a) All told, 35 Indians known to be non-Hoopas, of the Lower Klamath or Yurok tribes, the Upper Klamath or Karok tribe and the Redwood tribe, received allotments on the Square. Most of the allottees on the Square were, of course, Hoopas.

(b) Four Indians known to be of Hoopa blood received allotments on the Addition. Most of the allotees on the Addition were, of course, Yuroks.

(c) The non-Hoopas allotted on the Square were connected with the Square by residence there or by parentage, their parents having resided on the Square.

(d) The Hoopas allotted on the Addition were connected with the Addition by residence there.

Administrative Rulings

101. In connection with the allotment program, officials of the Indian Office on a number of occasions ruled that Indians of the Addition and the Square—Klamaths and Hoopas and others—were equally entitled to rights in the entire reservation as enlarged and, specifically, in the Square. These rulings are detailed in the following findings.

102. In 1915, while surveys for the final allotments on the Square were under way, there were several cases of Indians from outside the reservation who unsuccessfully sought to be enrolled with the Indians of the reservation with a view to becoming eligible for an allotment. One such applicant, James McDonald, was a half-Yurok who had lived on the Addition for some years.

C. F. Hauke, the Chief Clerk of the Indian Office, directed that McDonald show by affidavit the dates of his residence on the reservation, how "tribal relationship has been maintained," and that the matter then be presented to a council of Indians of the Hoopa Valley Reservation for an expression of views as to whether he and his children were considered to be "recognized members of the tribe."

On November 8, 1915, Superintendent Mortsolf at Hoopa valley advised that as instructed he had convened a council

of five Indians, who had rejected McDonald's application as well as those of three other Indians, for the same reasons, stated as to McDonald as follows:

> * * * James McDonald is not of Hoopa blood, and has no realtives [sic] either living or who have lived here; that he has never lived here, and that the quantity of land here is not any more than sufficient for the people who have always lived here.

On December 2, 1915, Hauke inquired of Mortsolf whether the council "represented all the tribes having rights on the Hoopa Valley Reservation, or only the Hoopa Tribe," and on the following January 15 Hauke requested that new applications be submitted, giving details of birth and Indian blood and stating whether the applicant's parents were "enrolled and recognized members of one of the tribes having rights on the Hoopa Valley Reservation and received benefits therewith." Such new applications, he said, should be submitted to a council "representative of the tribes having rights on the Hoopa Valley Reservation" for an expression of their views as to whether the applicant or his parents have "at any time been considered as recognized members of one of these tribes."

Mortsolf asked for guidance as to what tribes had rights on the reservation, as follows:

> I am not, nor never have been sure just what tribes have rights on the Hoopa Valley Reservation, never having seen a copy of the Act of Congress approved April 8, 1864 which is referred to in the Presidential proclamation determing [sic] the reservation.
>
> I will thank the Office to send me this information which now is necessary for me to have in order to determine whether any council would be representative of all tribes having rights here.

To this Hauke replied on February 19, 1916 that the tribes occupying and belonging to the Hoopa Valley Reservation were the "Hunsatung, Hupa, Klamath River, Miskut, Redwood, Saiaz, Sermalton, and Tishtanatan":

> The Act of Congress approved April 8, 1864 (13 Stat. L., 39), mentioned in Executive Orders of November 26, 1902 [an error], June 23, 1876 and October 16, 1891, makes no reference to the tribes having rights on the Hoopa Valley Reservation.

> The tribes living on the reservation that have participated in tribal benefits and been recognized as belonging on the said reservation may be considered for the purpose of passing on applications for enrollment as having rights therewith.
>
> From the annual report it will be noted that the following tribes are listed as occupying and belonging to the Hoopa Valley Reservation: Hunsatung, Hupa, Klamath River, Miskut, Redwood, Saiaz, Sermalton, and Tishtanatan.

(According to the Congressional Directory for 1916, Hauke was as Chief Clerk of the Indian Office the third ranking officer of the office. He followed in rank the Assistant Commissioner and preceded the chief inspector and the heads of the divisions.)

The defendant correctly characterizes Hauke's letter as evidence of Indian Office treatment of the Indians residing on the Square, the Connecting Strip and the Klamath River Reservation as having a common interest in those three tracts regardless of where they resided.

In pursuance of Hauke's instructions, Mortsolf added two members to the council, explaining to Washington that to the extent possible they represented the tribes listed by Hauke. He wrote that the Hunsatung, Saiaz and Tishtanatan were so scattered or intermarried with the Hoopa as to be extinct or unidentifiable, although councilman William Quimby was "a partial representative" of the Tishtanatan; that Hoopa "is the general name for practically all the minor tribes, which were represented at the time of the establishment of the reservation;" that the Redwood were once numerous but few were left, and that he had added William Stevens, "a full-blooded Redwood Indian," to the council to represent the Redwoods.

Of the Klamaths, Mortsolf said that they were "numerous;" that while "few of them live in Hoopa Valley proper, there are many of them adjacent, who are landless and who wish to acquire reservation rights. David Maston, has been added to the Council, to represent this tribe."

McDonald's new application was submitted to the council as reconstituted and was rejected because, the minutes recited, McDonald "does not belong to any of the tribes entitled to enrollment on the Hoopa Reservation."

Mortsolf then forwarded McDonald's application and the minutes of the meeting at which it was rejected, with a letter, dated June 19, 1916, urging that the council's action be approved. He said:

> The case of James McDonald is typical of practically all of the applications for enrollment from outside the reservation, and should the Office approve of the action and wishes of the Council and reject said application, there will be no need to take up the other cases mentioned in previous correspondence, unless any applications are found to differ in some of the essential points. It will be noted that the Hoopa Council unanimously voted recommending that the application of James McDonald be rejected. This council is composed of Indians living on the Hoopa Valley Reservation proper and represents all of the tribes not now extinct enumerated in the act of Congress and presidential proclamation setting aside this as an Indian Reservation.
>
> I hope that the Office may see fit to approve the recommendation and reject the application of James McDonald, insofar as his enrollment might entitle him to land within the Hoopa Valley Reservation. There are so many of these outside Indians who will apply for land and so little agricultural land available that it would defeat the purpose of allotment if the number of Indians were materially increased.

(Mortsolf is patently in error in referring, at the end of the first-quoted paragraph, to "all the tribes not now extinct enumerated in the act of Congress and presidential proclamation setting aside this as an Indian Reservation." There were no tribes enumerated in the act of 1864 (finding 10, *supra*) or in either of the two executive orders dealing with the Hoopa Valley Reservation (findings 29, 33, *supra*).)

On July 17, 1916, Hauke approved the rejection of McDonald's application, on the ground that McDonald was "never enrolled and recognized as a member of any of the tribes receiving benefits on the Hoopa Valley Reservation, nor did he ever maintain tribal relations therewith" and that the "representative tribal committee" had refused to adopt him.

Mortsolf had, with his letter of June 19, enclosed a letter from the council of the same date, on the general subject of the rights of Klamaths to allotments; the letter is set out in finding 89, *supra*. Hauke's letter of July 17 was addressed to Mortsolf and was a response to Mortsolf's letter of June 19

and not to the council's letter of the same date. Hauke does not mention the council's letter, and no response to the council's letter appears in the record.

103. The next ruling was made in connection with a protest of the allotments of Hoopa Valley land to a family named Horn, Karok or Upper Klamath Indians on the Turpin schedule, who were born on the Upper Klamath and came to Hoopa Valley in 1893. Superintendent Mortsolf reported as follows, on October 14, 1918:

> On the Klamath River there are two distinct languages spoken, namely, the Lower Klamath and the Upper Klamath. From the mouth up to and including Weitchpec, the Indians speak the Lower Klamath tongue and from above Weitchpec up as far a[sic] Happy Camp, the Upper Klamath River language is spoken. These languages are separate and distinct and I assume that there are two separate and distinct Indian tribes.
>
> At the time the selections were being made in that portion of the Reservation where the Horn allotments are located, a protest was made by James Jackson, Anderson Mesket and several others to the effect that the Horn family were not Indians who were entitled to lands in this Reservation.
>
> It is my understanding that the Hoopa Valley Reservation was established by an act of Congress, April 8, 1864 (13 Stat. 39) for the use and occupancy of several tribes of Indians among whom were mentioned the Klamath River tribes. It has never occurred to me that any distinction might be made between those Indians of Klamath River who live on the Upper and Lower part. I have, however, taken testimony of several witness [sic] publicly bearing upon these allotments and am submitting the same herewith. It is my opinion that there is no good reason why the Horn family should not be allotted at this time. Under date of July ly[sic], 1918, I was instructed by the Commission [sic] of Indian Affairs that those persons on the original allotment schedule should be given the privilege of making the first selections.

Chief Clerk Hauke, in a letter of April 22, 1919 (which both parties treat as the answering letter or an answer to a similar letter), agreed that the reservation was intended for the accommodation of the Indians of California, including both branches of the Klamath River tribe:

> Receipt is acknowledged of your letters of . . . March 8, 1919, with respect to the rights of certain Indians be-

longing to the Upper Klamath Tribe or Band, to receive allotments with the Indians of the reservation under your charge.

In answer, you are advised that the Office concurs in your view, that the Hoopa Valley Reservation which was established by the Act of April 8, 1864 (13 Stat. L., 39–40), for the accommodation of the Indians of the State of California, was intended to include both branches of the Klamath River Tribe. Further no restrictions whatever are made in the Executive Orders relating to the reservation, nor is it believed that the protests of the few Indians thereof to members of the Upper Klamath Band, should be allowed to interfere with these Indians, who, in the main were placed on the alllotment schedule made in 1895 by Special Allotting Agent Charles Turpin, as entitled to benefits of the Hoopa Valley Reserve.

Allotments of Square land to members of the Horn family were ultimately approved, and were among the allotments to non-Hoopas (finding 100, *supra*).

104. In 1927, again, Karoks, as Indians living in the immediate vicinity of the reservation, were held eligible to enrollment and to allotment, conditioned, however, upon their removal to the reservation, which was found not to have occurred in the case at hand. The Assistant Commissioner held that the reservation had been created in 1864 for all the Indians of California and that the extension of the reservation in 1891 to include the Lower Klamath Strip and the Connecting Strip was for the benefit of the Indians living along the Klamath.

The case was first presented on December 22, 1926, when Superintendent John D. Keeley wrote to the Commissioner concerning the applications of two Karok Indians, cousins, Rosa Sunderland and Linda Ince, for enrollment on the Hoopa Valley Reservation. Expressing some doubts as to whether the Karoks were a separate tribe or in reality the same as the "Klamath River Indians," he said that "[i]f these people have any right to enrollment it would be through the Klamath River Indians." He inquired "whether there is a distinction between the Klamath River Indians and the Hoopa Indians relative to tribal rights. Do the Klamath River Indians have any claim on the tribal lands of the twelve-mile square portion of the Hoopa Reservation?"

Mrs. Sunderland and Mrs. Ince had been born and raised at Happy Camp on the upper Klamath, above its junction with the Trinity, and thus off the reservation, and had apparently never lived on the reservation.

Assistant Commissioner E. M. Meritt responded on January 20, 1927, that the four reservations created under the 1864 act, of which the Hoopa Valley Reservation was one, were intended "to accommodate all the Indians of California" and that since the setting aside of the Hoopa Valley Reservation did not specify the tribes to occupy it and since the addition of the two Strips was for the benefit of the Indians along the Klamath, the Klamath Indians living in the immediate vicinity of the reservation had as much right as any other Indians, conditioned, however, upon their removal to the reservation:

> In your letter you ask to be advised as to whether or not the Klamath River Indians have any claim on the tribal lands of the twelve-mile square portion of the the Hoopa Indian Reservation. The twelve-mile square portion of this reservation was set aside by order of the Superintendent of Indian Affairs for California under authority of the Act of Congress of April 8, 1864 (13 Stat. L., 39), which authorized the setting aside of certain reservations for California Indians. These reservations were to be large enough to accommodate all the Indians of California. Neither the withdrawal nor the Act of Congress specified any particular Indians who were to occupy these reservations, and it is assumed that such Indians as are located in the immediate vicinity of the reservations are entitled to benefits thereon should they so desire. The one-mile strip on each side of the Klamath River was later added to the reservation for the benefit of the Indians living along the river. It is believed, therefore, that the Klamath River Indians have as much right on the reservation as any other Indians formerly residing in that part of the State of California, but it is believed that a removal to the reservation is necessary in order for them to obtain reservation land.

A second letter of May 11, 1927 from the Superintendent gave more information as to the distinction between Upper and Lower Klamaths—Karoks and Yuroks—and advised that the upriver Karoks had never moved to or become residents of the reservation, as distinguished from the Yuroks,

or downriver Klamaths, who lived on the Addition, from Weitchpec, at the junction of the Trinity and the Klamath, to the ocean. Accordingly, he wrote, only the Klamath Indians who lived from Weitchpec to the mouth of the Klamath River—that is, on the Connecting Strip and the Lower Klamath Strip—were entitled to reservation rights and were entitled to enrollment.

> There being Indians from the mouth of the Klamath River practically to its head waters. Those from the mouth to Weitchpec are on our rolls, and are for the most part allotted; those from Weitchpec to Orleans, Happy Camp and up the river are not on the rolls of any agency so far as I know. * * *
>
> * * * * *
>
> It has been customary to assume or to say that all Indians of Del Norte and Humboldt Counties are under the jurisdiction of this Agency, however, the Indians from Weitchpec, up the river, are really public domain Indians and have never lived on any reservation. In view of the statement of your office in your letter of March 5, 1927, LA 586222 [not in present record] defining the Hoopa Valley jurisdiction, it would appear that the only Klamath Indians under this jurisdiction would be the lower Klamath Indians which I take to be those from Weitchpec to the mouth of the river.

Mrs. Sunderland and Mrs. Ince, as Upper Klamath Indians, were therefore, he continued, on the authority of the Commissioner's letter of January 20, 1927 (*supra*) not entitled to enrollment, because not resident upon the reservation, and could become so entitled only if they lived in the immediate vicinity of the reservation and moved to the reservation:

> * * * [Y]our office ruled that Dan Effman and family, formerly a Karok Indian of the Happy Camp band, was entitled to enrollment here, he having resided here on the Reservation for a number of years. In view of the statements in your letters above * * * referred to, it would appear that the upper Klamath River Indians, among which is the Karok band, are not within the jurisdiction of this Agency, and that the only way they could place themselves within the jurisdiction of this Agency would be to move to the Reservation and establish a residence thereon provided they were, prior to their removal to the Reservation, living

in the immediate vicinity of this Reservation. It would appear from this that Mrs. Sunderland and Mrs. Ince would not be entitled to enrollment or allotment on this Reservation as they do not comply with any of the requirements cited above.

Accordingly, Mrs. Sunderland and Mrs. Ince were denied enrollment on the ground that neither they nor the tribe of which they were members, the Karoks, had moved to the reservation.

105. Lawrence McCarty, a Yurok born on the Square who lived there until he was 15, in 1920, and then worked off the reservation, living there part-time, applied for enrollment in 1931, with a view to selection of land on the Square which he hoped to have allotted to him.

Superintendent Boggess forwarded his application to Washington on February 12, 1931, saying:

> Mr. McCarty desires to select land within the twelve mile square of the Hoopa reservation and inasmuch as in a previous letter the Office informed me that Klamath Indians might select land therein there appears to be no objection to the arrangement.
>
> I, therefore, recommend approval of his request as submitted.

Commissioner Rhoads approved the application on March 9, 1931, as follows:

> As he was born on the reservation of Indian parents, at least, one of whom was allotted, he is entitled to enrollment under the Oakes case (172 Fed. Rep., 305), and you are authorized to enroll him under Section 324 of the Indian Office Regulations of 1904.

106. On July 8, 1930 Commissioner Rhoads in a letter to Superintendent Boggess advised that there being no restrictions in the executive order which in 1891 added areas to the reservation, an Indian of the Connecting Strip could exchange his allotment for one on the square. The opinion was expressed in broad terms, generally permitting exchange of an allotment for another on the original reservation or within the areas added:

> The receipt is acknowledged of your letter of June 14, 1930 regarding allotment rights on the Hoopa Valley Reservation and the additions thereto.
>
> The Hoopa Valley Reservation was created under authority contained in the Act of April 8, 1864 (13 Stat.

39–40), for the accommodation of the Indians of the State of California, and was intended to include both branches of the Klamath River Tribe. The so-called connecting strip which was added to the reservation by Executive Order of October 16, 1891 is considered merely to be an addition to the Original Hoopa Valley Reservation. No restrictions whatever are made in the Executive Order relating to the reservation and no reason is seen why any Indian who holds his allotment in trust should not be permitted to change his land for vacant lieu land on the original reservation or within the areas added thereto.

107. Special Allotting Agent Roblin expressed the opinion in his letter of January 12, 1933, that Indians of all the three parts of the reservation were equally entitled to lands on the Square (finding 94, *supra*). He said that the Indians of the "Klamath River" and "Lower Klamath" census rolls, by which he meant the Lower Klamath Strip and the Connecting Strip "are equally entitled to rights on the Hoopa Valley Reservation and on the addition thereto." He had tacitly assumed this, in his earlier report of November 19, 1932, that the Indians of the Lower Klamath Strip would probably not desire allotments from the lands remaining unallotted on the Square, and that 600 of the 934 Indians on the Connecting Strip and the Square would desire such allotments.

108. Commissioner Rhoads on February 20, 1933 halted allotments, and directed that the remaining land on the Square be assigned, on the ground that Indians of the Addition and of the Square were equally entitled to allotments, and that there was insufficient land for allotment to all who would be entitled. The central portion of his ruling, more fully quoted in finding 96, *supra*, reads as follows:

> Indians of the "Connecting Strip" and of the former Klamath River Reservation would be entitled to allotments equally with those living on the original Hoopa Valley Reservation, and it clearly appears from the reports that there would only be sufficient agricultural and grazing land on the reservation to allot a very small proportion of these Indians.

The Hoopa Business Council of 1933

109. Historically, the Indian tribes who occupied or settled upon the Hoopa Valley Reservation were not politically

organized, had no tribal government, at least in peacetime, and after the Hoopa Valley Reservation was established did not participate in its administration. This state of affairs continued until 1915.

110. (a) In 1915–16, in connection with applications for enrollment with a view to allotment, Superintendent Mortsolf convened a council which the Indian Office directed be representative of all the tribes having rights on the reservation (finding 102, *supra*).

(b) All the members of the council, including the Yurok added to the council to represent that tribe, resided on the Square. A petition by the council to the Commissioner, set out in finding 89, *supra*, showed that despite the directions from the Indian Office the council in fact spoke on behalf of Hoopa or Square Indians and in opposition to Yurok or Addition Indians. See also finding 102, last paragraph, *supra*.

(c) There is no evidence of any activity of this council beyond this brief period.

111. On May 5, 1930, Superintendent John D. Keeley reported to the Commissioner of Indian Affairs that the Hoopa Valley Reservation did not have a tribal council. (The report was made in connection with an application for enrollment, which Keeley thought should be denied, since the man involved had lived off the reservation all his life and did not plan to make his home on the reservation.) Of a council Keeley said that there was none and he was glad of it:

> As to putting the case up to the tribal council, this reservation does not have one, for which I am thankful, as tribal councils are the biggest source of agitation of anything in the Indian service. They are usually made up of the hand-picked agitators, and for the most part, the ones who can not, or will not, work or do anything for themselves.

112. Almost at the same time as this letter by Superintendent Keeley was written, Washington was writing to him, suggesting that a pending problem (the refusal of an Indian to do certain irrigation work) be presented to the tribal council. This letter was answered by Keeley's successor, O. M. Boggess, on July 24, 1930. Boggess replied that the problem had meantime been solved and, further "we have

no tribal council and I doubt the advisability of organizing one."

113. On January 10, 1933, Superintendent Boggess wrote to Commissioner Rhoads that since the time of the visit of a Senate investigating committee to the reservation, "our Indians at Hoopa" had become interested in organizing "a Business Committee or as they call it Tribal Council" which would have between 6 and 12 members "to represent the Hoopas in official matters." Boggess added he had no objection to this, because some of the "best Indians of the Valley" had been selected for the "Committee." He further explained that the Committee preferred to represent the Hoopas only, allowing the Klamaths down the river, "who but seldom come to Hoopa," to form their own council:

> Because of the fact that the Indians down the Klamath river but seldom come to Hoopa, and their interests in many cases are different it is understood that they prefer a legally organized body of the Hoopas only; permitting the Klamaths to form a similar organization for their people if they should care to do so.

114. By letter of February 3, 1933, Commissioner Rhoads replied that the Indian Office had no objection to the formation of such a tribal council as the Superintendent had proposed. He cautioned, however, that its activities would be advisory only and that in most cases final action would remain in the Department of the Interior. The letter authorized Boggess to call a council of Indians of his jurisdiction to adopt a constitution providing for election of the business committee.

115. In the meantime, on January 23, 1933, Boggess wrote again to the Commissioner advising that some of the Indians living along the Klamath River had also formed a business committee to represent the Indians residing along the river. Boggess recommended that since the terrain made it difficult for the Indians along the entire river to meet to elect representatives, this informally created committee should be recognized in "ordinary matters." He said:

> Owing to the exceedingly rough nature of this section and the lack of roads it would be exceedingly difficult to require the Indian people along the entire river to meet together for a regular election of councilmen, and as the number of matters requiring their attention is but

limited I do not think that they would be justified in going to this expense.

I suggest, therefore, that the Office write this body that it is possible that their organization has not been effected in exact accordance with its rules in regard to the election of a business committee but that it will be glad to recognize them in all ordinary matters which they wish to present in behalf of the Indians residing along the Klamath.

116. Commissioner Rhoads responded on April 20, 1933 that it had been understood that the council proposed in the Superintendent's first letter of January 10 (and already authorized (findings 113, 114, *supra*)) was intended to represent "the various tribes of Indians within the Hoopa Valley jurisdiction" so that it could handle matters affecting all of the "Hoopa Valley Indians." The Indians along the Klamath, the Commissioner continued, could have a separate committee for "local matters not involving the whole Hoopa Valley jurisdiction," but, he wrote, matters involving "the whole tribe" should be handled by "the tribal business committee for the whole tribe." He said:

> It was our understanding that the organization proposed in said letter of January 10 was intended to represent the various tribes of Indians within the Hoopa Valley jurisdiction. In this way the business matters affecting all of the Hoopa Valley Indians could, no doubt, be more economically and expeditiously handled.
>
> If the Indians residing along the Klamath River desire to have a separate business committee of their own for local matters not involving the whole Hoopa Valley jurisdiction, this Office has no objection. However, in matters involving the whole tribe, it is believed that they should act through their respresentatives on the tribal business committee for the whole tribe. We do not see the necessity, however, for selecting more than one representative from each of the eight districts for this organization.

117. When organized, the business committee of the Indians along the Klamath River was advised by Superintendent Boggess that the committee "would have to be through the Hoopa Council and it would only be a sub-council." The Klamaths were "disappointed that they couldn't have their own full council," and the council "died out." (The quota-

tions are from testimony of witnesses who recalled that attendance continued for only about a year.)

118. Sometime between February and May, 1933, Superintendent Boggess posted a notice calling for an election of the authorized council, but the response, he felt, was small and not representative, and no election was held at the appointed time. Thereafter, another plan was devised under which one representative was elected from each of a number of districts within the Square.

119. On June 3, 1933, seven Indians who had been elected councilmen from districts all of which were in the Square (and who were all residents of the Square) signed a petition to the then newly-appointed Commissioner of Indian Affairs, John Collier, in which they described themselves as "Councilmen of the Hoopa Tribe" and asked approval and recognition of their body as the representative of the "Hoopa Indians" to consider problems "within our boundaries," the boundaries not being specified. The petition said:

> We the undersigned duly elected Councilmen of the Hoopa tribe from the Hoopa Indian Reservation do hereby sincerely petition the Department of the Interior and John Collier, Commissioner of Indian Affairs, to be recognized as the authorized representatives of the Hoopa Indians to transact their business, negotiations and recommendations, to be consulted about expendetures [sic] and disbursements pertaining to the welfare of our tribe and absolute control of our tribal funds or any disposition of said funds.
>
> We sincerely wish to submit for your approval the organization of this tribe into seven Districts. Each of which have [sic] selected and elected by a majority of votes one Councilman for each district to meet one day each month to consider any problems which may arise within our boundaries.

* * * * *

120. On receipt in Washington of the petition, it was passed to the new Commissioner by J. R. Venning of the "Miscellaneous Section" of the Indian Office with a memorandum dated June 14, 1933, which, referring to the Department's letters of February 3 and April 20 (findings 114, 116, *supra*), said that no official report of the organization authorized had been received and that it was "quite probable" that the petition referred to the organization which had been authorized,

and, further, that while it looked like a good plan it would be well to have the constitution and the official report of proceedings before giving recognition.

121. Commissioner Collier thereupon on the following day wrote to Gilbert R. Marshall, secretary-councilman of the council, acknowledging receipt of the petition and requesting that Marshall confer with Boggess and ask him to write to Collier "as to the status of any tribal organization which may now exist at Hoopa."

122. Boggess was just about then, on June 19, writing to the Commissioner. Referring to the Office's letter of February 3 "authorizing the Indians of this jurisdiction to organize a tribal business committee" (finding 114, *supra*), he asked for recognition of a tribal business committee which had been elected in "each district of the reservation." The names of the districts were given. To one closely familiar with the neighborhoods in the Square, the names of the districts, all place names in the Square, six of the seven being places in the valley itself, would have disclosed that the electorate of the council was limited to the Square. The letter did not otherwise indicate the scope of the area—Square or entire reservation—or of the Indians to be represented by the committee.

123. On July 10, 1933, Boggess sent the Commissioner a copy of the constitution of "our Business Committee," with his recommendation that it be approved.

Before the constitution was received, Assistant Commissioner William Zimmerman, Jr., on July 21, 1933, responded to Boggess' letter of June 19, sending him a copy of the council's petition of June 3 (finding 119, *supra*), stating that Boggess' letter of June 19 gave insufficient information and asking for a report as to the organization and the matters taken up. This letter does not indicate that the constitution, mailed by Boggess on July 10, had been received.

124. The "Constitution and By-Laws of the Hoopa Business Council," (a single document), was sent by Boggess to the Commissioner on July 10. It provided as follows:

> Article 1. This organization shall be known as the Hoopa Business Council.
>
> Article 2. The members of the Business Council shall be elected to act for the tribe * * *.

> The views of the tribe having been determined, the business council shall be cloaked with authority to act in any and all tribal matters, including tribal claims of every nature.
>
> * * * * *
>
> Article 3. The business council shall be composed of seven enrolled members of the Hoopa tribe; bona fied [sic] residents of Humboldt County, California, and twenty-one years of age or over.
>
> * * * * *
>
> Article 18. This constitution shall be in full force and effect to govern the Hoopa tribe and business council on and after the date it is approved by the Commissioner of Indian Affairs at Washington, D.C.

Aside from the quoted references to "the Hoopa tribe," the constitution did not indicate the geographical scope of the jurisdiction of the council—whether Square or entire reservation, the districts from which the councilmen would be elected, the eligible class of electors, or give any other data which would disclose whether the council was to be representative of or empowered to act concerning the Square alone or the entire reservation.

125. On November 20, 1933 Commissioner Collier approved the constitution, in a letter addressed to the secretary of the Hoopa Business Council. The full text of the letter read as follows:

> This will advise that careful consideration has been given to the constitution and by-laws of the Hoopa Business Council submitted some time ago by the superintendent of the Hoopa Valley Indian Agency, and they are hereby approved.
>
> This organization is recognized by this Service as being the official representative body of the Hoopa Valley tribe.

A note at the foot of the letter reads "Carbon to Hoopa Valley."

The Hoopa Business Council—Composition and Operations

126. In July 1934, Superintendent Boggess responded to an Indian Office circular questionnaire on tribal governments on reservations. In answer to the question "Does your council or committee or other organization represent the entire reserva-

tion or jurisdiction or are there separate organizations for each tribe" he said that the council represented the Square only:

> Represents only the 12 mile square Hoopa proper [sic]. Klamath River, Extension a mile on each side of river from Hoopa reservation to Ocean, not represented on this council.

He confirmed this answer in responding as follows to a question as to the weaknesses of the present tribal government:

> Inability to have proper representation from Klamath River portion. Difficulty of travel makes it impracticable for them to attend. Being a separate tribe they are not welcomed by Hoopas on strictly Hoopa matters.

127. The members of the Hoopa Business Council organized pursuant to the constitution and bylaws of 1923 were elected from six districts in the Hoopa Valley proper and one district on Bald Hills near the Valley, all in the Square, by the Indians residing in those districts.

128. Though the constitution of the Hoopa Business Council provided that council members be enrolled members of the Hoopa tribe (finding 124, *supra*) Indians of Yurok and Karok blood were members for periods of many years. They were David Risling and Jerry Horne, residents and allottees of land on the Square; George Nelson and David Masten (the latter is the same "David Maston" as had represented the Klamaths on the 1916 council (finding 102, *supra*)), both of whom held allotments on the Connecting Strip and were long-time residents on the Square; and Elizabeth Quimby, a long-time resident of the Square.

129. A number of Indians of mixed Yurok and Hoopa blood were members of the council. They were Edward Marshall, chairman in 1933–35; Gilbert Marshall, a member during ten years, 1933–35 and 1945–50, and chairman in 1935–37; Julius Marshall, a member for five years, 1935–39; Mahlon Marshall, chairman during five years, 1939–43; James Marshall, a member in 1943–45; Ernest Marshall, a member in 1948–50; Delmar Colegrove, a member in 1938–39; Gene Colegrove, a member in 1939–40; Byron Nelson, a member in 1948–49 and 1959; and Peter Masten, a member in 1936 and chairman in 1948–50. The Marshalls were half-

Hoopa, half-Yurok; the others had varying fractions of Yurok and Hoopa blood.

130. The Hoopa Business Council dealt not only with matters affecting the Square but also received delegations of Indians of the Addition and dealt with matters on or arising from the Addition. These matters, arising over the nineteen-thirties and nineteen-forties, included land disputes, expenditures and recommendations for improvement of roads, irrigation facilities and domestic water arrangements, a mineral lease, licenses for Indian traders and mapping along the Klamath River.

131. The council's Indian Court, to which it appointed as the reservation's Indian Judge David Masten, a prominent Yurok Indian (see finding 128, *supra*), passed upon disputes arising on the Addition as well as those arising on the Square, thereby exercising the same all-reservation jurisdiction as did the council itself.

Yurok and Addition Organizations

132. The Yurok Tribal Organization, a California corporation, was formed in 1949 to represent and promote the interests of all persons of Yurok ancestry, a group described as native to and resident of the Klamath River Basin, an area larger than the Addition.

133. A Yurok Indian Club is mentioned in the record in two widely-separated years. Nothing is known of its nature or membership.

134. On September 3, 1955 a constitution was adopted by a group of Indians, presumably Yuroks of the Connecting Strip, establishing an organization called the "Yurok Extension Business Organization," whose members would be Yuroks and which would exercise jurisdiction over the unallotted trust-status lands of the Connecting Strip. The Commissioner refused to approve the organization on the grounds, among others, that the organization would be confused with the "Yurok Tribal Organization" (finding 132, *supra*) and that the membership was limited to Yuroks while not all the residents of the area intended to be represented were Yuroks.

135. In 1961, long after the issue in the instant case had arisen, the Government encouraged the formation of a

"Hoopa Extension Reservation Organization," to exercise jurisdiction over the unallotted trust-status lands on the Connecting Strip. The members of the organization would be allottees on the Connecting Strip, lineal descendants of such allottees, of a specified percentage of Indian blood, and persons who "should have been" allotted. Despite the support of the Indian Office for the adoption of a constitution (which would have accepted the premise of the Government in the instant case of a separation of the rights of the Addition and Square Indians) the constitution was voted down, 110 to 31, the majority being of the opinion that they had a right to be members of an all-reservation group and intended to use legal means to enforce their rights.

1950—The Hoopa Valley Tribe, its Hoopa Valley Business Council and the Official Roll of the Members of the Tribe

136. In 1948, the Hoopa Business Council began formulating a program for the compilation of a current roll of the Indians of the Hoopa Valley Reservation as it originally was created, that is, the Square, for the purpose of controlling the revenues from the resources of the reservation as so defined. The discussions at council meetings of the compilation of the proposed roll, as reported in the minutes of the meetings, reflect a sentiment to exclude from the roll Indians of the Addition.

137. The council approved a form of application for enrollment on the proposed roll, prepared by the chairman and secretary of the council. The form was distributed only in the districts of the council, located in the Square. It was not distributed on the Lower Klamath Strip and the Connecting Strip because it was intended to exclude from enrollment the Indians residing there, unless they could qualify as a descendant of an allottee on the Square.

138. The application form was entitled "Application for Enrollment—Hoopa Valley Reservation—as of November 1, 1948." Inquiry was made on the form only as to the degree of "Hoopa Indian Blood." The application form inquired as to the applicant's justification for applying for enrollment, but did not state the basis upon which the applicant's eligibility for enrollment would be determined.

139. From the Indians who submitted application forms, the Hoopa Business Council prepared a list, entitled Schedule A, of those who had been allotted land on the Square or who were descendants of such allottees, and a list, Schedule B, of eighteen Indians who were not allottees or descendants of allottees on the Square, but were either "true" Hoopa Indians or Indians whom the council felt were entitled to membership in the tribe because their failure to obtain allotments was through no fault of their own.

140. At its meeting on April 6, 1950, the council set an election for May 13, 1950, for the purpose of adopting the schedules which it had prepared as the roll of Indians who would be entitled to share in the revenues from the resources of the original reservation, that is, the Square.

141. A notice was posted, addressed to "The Electors Of The Hoopa Valley Indian Tribe," that the election on May 13, 1950, would have the following purposes: 1) "To determine the minimum degree of Indian blood which a member of the Hoopa Tribe must have to be eligible for Tribal enrollment in the future;" 2) "To adopt a new Constitution and Bylaws for the Tribe;" 3) "To adopt officially into the Hoopa Tribe that certain list, designated as Schedule A, of Hoopa allottees and their descendants, to enable them to share in Hoopa Tribal benefits and moneys;" and 4) "To adopt officially into the Hoopa Tribe that certain list, to be designated as Schedule B, of Indians and their descendants who were not given allotments to enable them to share in Hoopa Tribal benefits and moneys."

The council had stated that persons at least twenty-one years of age, who had made application for enrollment, could be eligible to vote. The notice stated that the electors entitled to vote at the election must be not less than twenty-one years of age and must be on that list of Indians who made application for enrollment into the "Hoopa Tribe" prior to October 1, 1949, and that the list could be seen at the office of the Hoopa Indian Sub-Agency.

142. The "Hoopa allottees and their descendants" referred to in the foregoing notice to electors were the living allottees on the Square and their living descendants who had made application for enrollment and had been placed on Schedule A by the Hoopa Business Council. The Indians on Schedule

B were the eighteen Indians placed on the schedule by the Hoopa Business Council and were stated to be "either true Hoopa Indians" or to be entitled to membership in the tribe "since their failure to obtain allotments was through no fault of their own." The Indians on the list of Indians who made application for enrollment into the Hoppa Tribe prior to October 1, 1949, who the notice stated to be the electors entitled to vote, were not all of the Indians who had made application for enrollment. Rather, the Indians on this list, which the notice stated could be seen at the office of the Hoopa Indian Sub-Agency, were those Indians who had applied for enrollment and who the Hoopa Business Council had found to be allottees or descendants of allottees on the Square. Thus, the Indians on the list of electors and the Indians on the Schedule A to be voted upon were the same.

143. The electors were not representative of the Indians of the entire Hoopa Valley Reservation in that they did not include (a) Yurok or other non-"true"-Hoopa non-allotted Indians of the reservation, primarily Indians of the Addition, who were not descendants of allottees on the Square, and their descendants; and (b) Indians who had been allotted on the Addition, and their descendants.

144. At the election, held on May 13, 1950, 106 persons voting, the proposed constitution and bylaws was adopted by a vote of 63 to 33.

145. The constitution and bylaws adopted on May 13, 1950 established an organization denominated the "Hoopa Valley Tribe." The membership of this organization is described in Article IV of the constitution as follows:

> Section 1. The membership of the Hoopa Valley Tribe shall consist as follows:
>
> (a) All persons of the Hoopa Indian blood whose names appear on the official roll of the Hoopa Valley Tribe as of October 1, 1949, provided that corrections may be made in the said roll by the Business Council within five years from the adoption and approval of this Constitution, subject to the approval of the Secretary of the Interior or his authorized representative.
>
> (b) All children born to members of the Hoopa Valley Tribe who are at least one-quarter degree Indian blood.
>
> Section 2. The Business Council shall have the power

to make rules governing the adoption of new members or the termination of membership in the tribe.

146. The constitution and bylaws of May 13, 1950 created an executive body called the Hoopa Valley Business Council and conferred upon the council authority to direct the distribution of the resources of the Square, in addition to the authority (preceding finding) to make the rules governing membership in the "Hoopa Valley Tribe." The assumption of power over the Square was accomplished by Article III, *Territory*, which provided that the jurisdiction of the Hoopa Valley Tribe should extend to the Hoopa Valley Reservation as established by executive order in 1876, that is, the Square:

> The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians of California.

147. Schedules A and B, the tribal roll (findings 139–40, *supra*) were also adopted at the election held on May 13, 1950. Schedule A was adopted by a vote of 17 to 16. The adoption into the tribe of each of the 18 persons on Schedule B was approved by varying majorities.

148. Residence on the Hoopa Valley Reservation was not a requirement for inclusion on Schedule A, the list of allottees and their descendants. "Many" (the word of the Government's District Agent in forwarding the official roll for approval) of the persons on Schedule A were not then residents of the Hoopa Valley Reservation.

149. In June, 1950, a Hoopa Valley Business Council was elected, as provided in the constitution and bylaws.

150. The Hoopa Valley Business Council, although its jurisdiction was by the constitution limited to the Square (finding 146, *supra*) acted upon matters in the other parts of the reservation, as had its predecessor, the Hoopa Business Council (finding 130, *supra*), such as approvals of land selections outside the Square and a right of way for a road outside the Square.

151. On February 1, 1951, the Director of the Sacramento Area Office of the Bureau of Indian Affairs advised the Superintendent of the Hoopa Valley Reservation that the

Indians of the Klamath Strip should be represented on the Hoopa Valley Business Council, as follows:

* * * * *

> It is our opinion that the title status of the main portion of the Hoopa Valley Reservation and that of the Klamath River Strip extending downstream approximately 20 miles from this area is exactly the same, therefore any funds derived from the resources of the Klamath River Strip area should be accredited to the Indians of the Hoopa Valley Reservation. The Indians of the so-called Klamath Strip are, in our opinion, members of the Hoopa Valley Reservation.
>
> We agree with your thought in the second paragraph of your letter that the Indians in the so-called Klamath Strip should have representation on the Hoopa Business Council.
>
> We do not have any contemplated timber sales in this area at the present time, although, as you know, there have been several requests for such sales.

152. (a) On December 6, 1951, the Hoopa Valley Business Council appointed a committee to formulate a plan for the enrollment of additional Indians with the Hoopa Valley Tribe on a "C" Roll.

(b) The "C" Roll committee submitted a report at the March 28, 1952, meeting of the council with a request that the council fix the period of residence on the Hoopa Valley Reservation that would be required for enrollment on the "C" Roll.

(c) A year later, on April 2, 1953, the council established requirements for enrollment on the "C" Roll and set June 2, 1953, as the deadline for the acceptance of applications. These requirements were that an applicant must have resided in Hoopa for a period of 15 years, must have had forebears born on a ranchero on the Square; and must be of at least one-quarter Hoopa blood. On June 10, 1954, the council adopted a resolution declaring eighteen applicants for enrollment on the "C" Roll to be members of the Hoopa Valley Tribe.

153. On March 25, 1952, the Commissioner of Indian Affairs approved Schedules A and B, which had been adopted May 13, 1950 (finding 147, *supra*) and on September 4, 1952, he approved the constitution, with certain exceptions

(withholding approval of a tribal court and requiring that the function of approval of the actions of the council be lodged in the Area Director rather than the Commissioner).

154. By letter dated September 4, 1952, the Commissioner advised the Chairman of the Hoopa Valley Business Council that: "There is no objection to the operation of tribal business in accordance with the Constitution and Bylaws adopted by the Hoopa Valley Indians in a referendum held on May 13, 1950, until such time as this office and the Hoopa Valley Indians can establish suitable organization under provision of the laws of the State of California * * *."

155. On November 6, 1959, the Hoopa Valley Business Council adopted the following resolution defining the criteria which it had employed 6 years earlier in compiling the "C" Roll and purporting to clarify the criteria employed by the former Hoopa Business Council in compiling, some 10 years earlier, Schedules A and B, the so-called "Official Roll of the Hoopa Valley Tribe as of October 1, 1949," as follows:

> Whereas: The absence of written rules and procedures to explain the composition of the "Official Roll of the Hoopa Valley Tribe as of October 1, 1949," also corrections thereto, has been conducive to various interpretations of eligibility requirements, and,
>
> Whereas: Lack of consistent actions in the determination of eligibility of applicants has resulted in charges that the Business Council has not acted in strict accordance with the Constitution and Bylaws of the Hoopa Valley Tribe, and,
>
> Whereas: There is need for an accurate and complete membership roll to be used in conjunction with the allotment program desired by the Hoopa Valley Tribe.
>
> Now therefore be it resolved: That the following definitions accurately describe the procedures followed and clarify the intent not heretofore expressed in the membership requirements as set forth in Article 4 of the Constitution and Bylaws of the Hoopa Valley Tribe approved September 4, 1952:
>
> Definitions
>
> 1. Hoopa Valley Tribe
>
> The Hoopa Valley Tribe consists of remnants of the Hunstang, Hupa, Miskut, Redwood, Saiaz, Sermalton, and Tish-tang-atan Bands of Indians residing

within the twelve-mile square reservation created June 23, 1876, and their descendants.

2. Official Roll of the Hoopa Valley Tribe as of October 1, 1949

"The Official Roll of the Hoopa Valley Tribe as of October 1, 1949" consists of Schedule A captioned "Official Roll as of October 1, 1949, of Members of the Hoopa Valley Tribe Who May Participate in Tribal Benefits and Moneys" and Schedule B captioned "Addition to the Official Roll of Members of the Hoopa Valley Tribe Who May Participate in Tribal Benefits and Moneys" both schedules being approved at a general election on May 13, 1950, and approved by the Commissioner of Indian Affairs on March 25, 1952. Approval of the Schedule B applicants was given by voting on the 18 individuals named on the list.

3. Schedule A.

Schedule A consists of allottees living on October 1, 1949, whose names appear on the J. B. Mortsolf original allotment schedule for the Hoopa Valley Reservation approved March 2, 1922, and descendants of such allottees living on October 1, 1941.

4. Schedule B.

Schedule B consists of applicants living as of October 1, 1949, and filing at the same time as applicants who were included on Schedule A, whose residence within the twelve-mile square area of the Hoopa Valley was not subject to question, who although eligible to have received allotments were never allotted but who were generally considered as members of the Hoopa Valley Tribe and permitted to participate in Tribal Affairs, and their descendants living on October 1, 1949.

5. Corrections.

Corrections to the Official Roll of the Hoopa Valley Tribe as of October 1, 1949 were authorized under Article 4, Section 1(2) during a period of five (5) years ending September 4, 1957. Such corrections applied to: "Persons born not later than October 1, 1949, who qualified by the same requirements as met by persons on either Schedule A or Schedule B comprising the October 1, 1949 roll, whose applications were filed within the five year period ending September 4, 1957."

6. Schedule C.

Pursuant to authorization contained in Article 4, Section 2 of the Constitution and Bylaws a schedule C appli-

cation procedure was devised. A Schedule C applicant was required to have resided within the Hoopa Valley Reservation for a minimum of 15 years, to have had forebearers born within the twelve-mile square Hoopa Valley Reservation, to have had at least 1/4 degree Hoopa blood or have been a legally adopted child having at least 1/4 degree Indian blood and to have filed an application within a sixty(60) day period ending June 2, 1953.

7. Children.

"Children" as used in Article 4, Section 1 (b) is restricted to persons born after October 1, 1949.

Procedures

The C Schedule established certain specific requirements to be met by those persons who were ineligible for enrollment under the requirements of Schedule A and Schedule B. Eligibility was determined on an individual basis and did not automatically pass from a parent to a child born prior to October 1, 1949. However, once an individual was approved for membership as a C Schedule applicant, he acquired the same rights and privileges as other enrolled members.

156. The following month, on December 11, 1959, the Hoopa Valley Business Council adopted a resolution amending the resolution of November 6, 1959, purporting again to clarify the criteria employed by the former Hoopa Business Council in compiling Schedule A, which with Schedule B comprised the so-called "Official Roll of the Hoopa Valley Tribe as of October 1, 1949". This resolution amended definitions 2 and 3 of the prior resolution (preceding finding) to read as follows:

2. Official Roll of the Hoopa Valley Tribe as of October 1, 1949.

The Official Roll of the Hoopa Valley Tribe as of October 1, 1949 consists of Schedule A and Schedule B, as herein defined, both schedules being approved at a general election on May 13, 1950, and by the Commissioner of Indian Affairs on March 25, 1952.

3. Schedule A.

Schedule A consists of allottees living on October 1, 1949, and descendants of allottees living on October 1, 1949.

1917-1958—Proceeds of the Sale of the Lands of the Old Klamath River Reservation

157. The 1892 act which provided for the sale of the lands of the Klamath River Reservation (finding 77, *supra*) provided, also, that the proceeds of the public sale of lands were to be a fund used by the Secretary of the Interior for the "maintenance and education" of the resident Indians. In 1917 the statute was amended to add to these purposes "the *pro rata* improvement of individual Indian allotments" and "the construction of roads, trails, and other improvements for their benefit." Act of March 2, 1917, 39 Stat. 969, 976.

158. The proceeds of the public sale of lands of the old Klamath River Reservation were held in a Treasury account entitled "Proceeds of Klamath River Reservation," and interest on the sums therein was credited to an interest account with the same name.

159. In 1918 a road costing approximately $16,000 was built through the area of the old Klamath River Reservation with the use of funds from the account "Proceeds of Klamath River Reservation." While the work was underway, Congress enacted general legislation that tribal funds could be spent only pursuant to a specific appropriation. Sec. 27, Act of May 18, 1916, 39 Stat. 123, 158. Thereafter $3,215.12 was expended by the Superintendent to complete the road, without such an appropriation. In 1920 Congress, after the fact, authorized payment of this sum in the Act of February 14, 1920, 41 Stat. 408, 418, as follows:

> That the Secretary of the Interior and the Secretary of the Treasury be, and they are hereby, authorized to allow payment of an indebtedness amounting to $3,215.12 incurred by the Superintendent of Hoopa Valley Agency, California, during July, August, and September, 1918, in the construction of a trail on the Klamath River Reservation, from the tribal fund known as "Proceeds of Klamath River Reservation, California," which was made available for that and other purposes by the Act of March 2, 1917 (Thirty-ninth Statutes at Large, page 976), but from which no expenditures were authorized by section 27 of the Act of May 25, 1918 (Fortieth Statutes at Large, page 591.)

160. On December 31, 1942 Superintendent Boggess requested authorization of an expenditure of $200 from "the tribal fund of the Lower Klamath Indians" (by which he apparently meant the account "Proceeds of Klamath River Reservation"), as distinguished from what he characterized as the "tribal fund of the Hoopa Valley Indians" (by which he presumably meant the all-reservation fund in the account "Proceeds of Labor, Hoopa Valley Indians," finding 167, *infra*), for the expenses of a visit by a committee of Lower Klamath Indians to the State legislature to seek a bill reimbursing the Indians for losses by a closing of the river to fishing in 1933.

161. As of March 19, 1947 there was $5,107.35 in the account "Proceeds of Klamath River Reservation" and $3,204.10 in the parallel interest account.

162. On March 19, 1947 the Superintendent reported with his recommendation for approval a "request from the tribal council of this area" for an allotment of $300 from the interest account to pay the costs of a trip to Sacramento in re the "Claims of California Indians." (There was no such council. The record shows only a resolution requesting such an allotment, passed 25 to 0 "[a]t a meeting of the Yurok Indians of the lower Klamath River held at Klamath California on March 23, 1947.")

163. A letter from the Sacramento Area Office of the Bureau of Indian Affairs dated February 3, 1954 addressed to the secretary of the "Yurok Tribal Organization" (finding 132, *supra*), stated that the office had been allotted $1,000.00 of "Yurok Tribal funds," presumably funds in the account "Proceeds of Klamath River Reservation" for the program submitted by the secretary, including travel expenses of tribal delegates.

164. On September 19, 1934, by Department order in the Department of the Interior, such of the land on the former Klamath River Reservation as had been opened for public settlement under the provisions of the Act of June 17, 1892, (finding 77, *supra*) but which had not been settled upon, was withdrawn from disposition pending possible restoration to tribal ownership. By a subsequent order on November 5, 1935, this land was continued in a state of withdrawal.

165. The withdrawal from sale of unsold lands of the

former Klamath River Reservation (preceding finding) was made permanent in 1958. The Act of May 19, 1958, 72 Stat. 121 provided for the restoration of tribal ownership of 159.57 acres of land on the reservation at Klamath River, California and of other, larger tracts on other reservations. Title to "the lands restored to tribal ownership" was to be in the United States in trust for "the respective tribe or tribes" and the various tracts were "added to and made a part of the existing reservations for such tribe or tribes."

1955—Payment by the Government of the Income from the Square Exclusively to Persons on the Official Roll of the Hoopa Valley Tribe

166. In 1951, the Sacramento Area Director of the Bureau of Indian Affairs (apparently the Commissioner's delegate in such matters (see finding 153, *supra*)) advised that any funds derived from the resources of the Klamath River Strip area of the reservation should be credited to the account of the Indians of the Hoopa Valley Reservation. His letter is quoted in finding 151, *supra*.

167. Until 1955, any revenues from both parts of the Hoopa Valley Reservation—the Square and the Addition—were deposited in a single United States Treasury Account, No. 14X7236, entitled "Proceeds of Labor, Hoopa Valley Indians." The interest derived from the funds in this account was credited to United States Treasury Account No. 14X7736, entitled "Interest on Proceeds of Labor, Hoopa Valley Indians." Disbursements were made from these accounts for improvements on all parts of the reservation.

168. Although all the revenues from the reservation went into one account (preceding finding), Superintendent Boggess seems to have sought to relate the benefits from expenditures to the place of the source of the funds being expended. Thus, at a time in 1938 when the total revenues in Account No. 14X7236 derived from outside the Square were $2,511.45, of which $2,263.80 had been derived from a contract with a lumber company to cut timber at Johnson's Village on the Connecting Strip, Superintendent Boggess planned to spend only $2,263.80 for water developments at Johnson's Village, as "the amount received from the sale of cedar in that locality," though the appropriation for the water development at

Johnson's Village was $2,500.00. Actually, additional sums of $187.70 and $53.04 in the account had also been derived from the cutting of timber on unallotted trust-status tribal land at Johnson's Village.

169. On April 23, 1954 the Area Director of the Indian Bureau at Sacramento requested the establishment of an account for depositing "receipts to the credit of the Yurok Indians of California." The response of the Fiscal Section, dated April 29, 1954 listed five reservations in which "different groups of Yurok Indians resided"; on the list were "Hoopa Valley Reservation" and "Klamath River Reservation." On July 1, 1954 the Director of the Division of Budget and Finance in the Office of the Secretary requested the Treasury to establish two accounts as follows:

147153 Deposits, Proceeds of Labor, Yurok Indians of Lower Klamath River, California.
147154 Deposits, Proceeds of Labor, Yurok Indians of Upper Klamath River, California.

Trust fund receipt, appropriation and interest accounts were opened, one each for the "Yurok Indians of Lower Klamath River," all ending in the number 53, and one each for the "Yurok Indians of Upper Klamath River," all ending in the number 54.

170. Commencing in 1955, revenues derived from the resources of the Connecting Strip were credited to Account No. 14X7154, "Proceeds of Labor, Yurok Indians of Upper Klamath River, California" and revenues derived from the resources of the Lower Klamath River strip were credited to Account No. 14X7153, "Proceeds of Labor, Yurok Indians of Lower Klamath River, California." As of 1969 approximately $72,070 had been credited to Account No. 14X7154, and $3,956 to Account 14X7153. Revenues derived from the resources of the Square continued, as before, to be credited to the accounts for the benefit of the "Hoopa Valley Indians" (finding 167, *supra*). The major portion of these revenues has been from timber sales.

171. Beginning in 1955 and continuing to the present time, the Secretary of the Interior, upon requests made by resolutions of the Hoopa Valley Business Council, has each year disbursed, from the accumulated income in Account No. 14X7236 and its interest Account No. 7736 for the Hoopa

Valley Indians (finding 167, *supra*), per capita payments to the Indians on the official roll of the Hoopa Valley Tribe organized pursuant to the constitution and bylaws adopted at the election of May 13, 1950 (findings 136 *et seq.*, *supra*).

172. The total of the per capita payments through February 1969 was $12,657,666.50. The payments were made at the following times and in the following amounts:

Payment period	Total amt. each payment	Amt. paid each indiv.
#1 Jan 1955	$76,500	$100
Suppl. Aug 1955	1,600	
Suppl. Apr 1955	1,900	
#2 Sept 1955	$158,600	$200
Suppl. Dec 1955	10,600	
#3 Jan 1956	$255,600	$300
Suppl. Jan 1957	3,600	
#4 Oct 1956	$178,600	$200
#5 Apr 1958	$277,500	$300
Suppl. Mar 1959	4,200	
Suppl. Apr 1959	300	
#6 Dec 1958	$265,100	$275
#7 Apr 1959	$261,630	$270
Suppl. Aug 1959	270	
#8 Dec 1959	$275,942	$281
#9 Apr 1960	$275,931	$279
#10 Dec 1960	$458,304	$448
#11 Apr 1961	$459,096	$444
#12 Dec 1961	$382,320	$360
Suppl. Apr 1962	720	
Suppl. June 1962	1,800	
#13 Apr 1962	$381,625	$355
Suppl. June 1962	1,775	
Suppl. Apr 1962	1,420	
#14 Dec 1962	$479,600	$430
#15 Apr 1963	$480,630	$433
#16 Dec 1963	$703,425	$622.50
#17 Apr 1964	$703,700	$620
#18 Dec 1964	$625,240	$539
#19 Feb 1965	$625,937	$541
#20 Dec 1965	$604,257.50	$512.50
#21 Apr 1966	$605,696	$512
#22 June 1966	$696,000	$600
#23 Dec 1966	$534,600	$445.50
#24 Mar 1967	$534,417.50	$443.50
#25 Oct 1967	$233,530	$193
#26 Nov 1967	$233,530	$193
#27 Feb 1968	$233,593	$191
#28 June 1968	$233,593	$191
#29 Aug 1968	$465,129	$374.50
#30 Nov 1968	$465,129	$374.50
#31 Feb 1969	$464,746.50	$371.50
	$12,657,666.50	$11,405.50

173. The Secretary of the Interior has refused and has continued to refuse to distribute any income derived from the Square portion of the Hoopa Valley Reservation to any Indians of the Hoopa Valley Reservation other than those who are members of the Hoopa Valley Tribe according to its official roll.

174. In 1958 the Deputy Solicitor of the Department of the Interior ruled that "no Indians other than those enrolled as members of the Hoopa Tribe of the original 12-mile square reservation and their descendants, have rights of participation in the communal property on that part of the Hoopa Valley Reservation." 65 Dec. Dept. Int. 59, 68 (1958). Making no reference to the presence of Klamaths on the Square, he held that the Hoopas had exercised jurisdiction over the Square from earliest times and that their rights were vested by 1891. The executive order of that year he held to have been merely "an aid to the administration of these two separated areas" and as making the former Klamath River Reservation and the Connecting Strip a part of the enlarged Hoopa Valley Reservation only "technically." 65 Dec. Dept. Int. at 63, 64.

The Government does not in the instant case contend either that this opinion has any binding force or that it is correct in its facts. The opinion does not reflect the facts set out in these findings, primarily the presence of Klamaths on the Square from aboriginal times continuously to 1891 and beyond: moreover, it contains errors of commission and omission, among them the impression given throughout that the Hoopas were the sole occupants of the Square, from the time before the first location of the reservation in Hoopa Valley: that the tribal council on the Square was a permanent institution from 1916 (65 Dec. Dept. Int. at 62; compare findings 109–112, *supra*); the impression given that Chief Clerk Hauke's letter of July 17, 1916, was an approving response to the council's letter of June 19, 1916 (65 Dec. Dept. Int. at 66; see finding 102, *supra*); and the statement that the allotments approved on the Square were submitted by the Hoopa Tribal Council (65 Dec. Dept. Int. at 67; compare findings 86–97, *supra*).

Ultimate Findings and Conclusions on the Common Issue of the Exclusive Rights of the Hoopas in the Square

175. Under the Act of April 8, 1864, authorizing the President to set apart and locate not more than four reservations in California, at least one to be in the northern district, of such size as he found suitable, for the accommodation of the Indians of California, without specification of the tribes to be so accommodated, the President had discretion to authorize any Indian tribes of California to reside upon such reservations as he set apart. No Indian tribe resident upon a reservation created under the act could obtain vested rights to the exclusion of another group or tribe of Indians thereafter authorized by the President to share in the benefits of the reservation. *Healing* v. *Jones*, 210 F. Supp. 125, 138, 153, 170 (D. Ariz. 1962), aff'd 373 U.S. 758 (1963); *Healing* v. *Jones*, 174 F. Supp. 211, 216 (D. Ariz. 1959); *Crow Nation* v. *United States*, 81 Ct. Cl 238, 278 (1935).

176. Superintendent Wiley's public notices of August 21, 1864 and February 18, 1865 (findings 13, 21, *supra*) locating the Hoopa Valley Reservation on the tract thereafter called the Square, were issued pursuant to the authority of the act of 1864 and subject to Presidential approval and, having made no mention of any Indian tribe, provisionally established the reservation for such Indians or tribes as might be settled or reside upon it with Presidential authority.

No tribe settled upon or residing upon the reservation pursuant to the notices could, in view of the grant of discretionary authority by the act of 1864 to the President, obtain vested rights in the Square to the exclusion of another group or tribe of Indians thereafter authorized by the President to share in the benefits of the reservation.

177. The so-called "treaty" made at Hoopa Valley in 1864 (finding 15, *supra*), said to be the source of the Hoopas' rights in the Square, is concededly not a binding treaty in the constitutional sense. An agreement by an executive officer could not foreclose the President's authority under the act of 1864 to establish a reservation for such Indians as might be settled there with his approval, and thereafter to enlarge

the reservation for the common benefit of the Indians of the added lands and of the original reservation.

178. Any rights to Hoopa Valley given by the treaty to the Hoopas were given equally to other tribes as well, including the Klamaths. The treaty was either made with a number of tribes including the Klamaths or the Klamaths became entitled to its benefits, in accordance with Section 1, Article 1 of its text (finding 15, *supra*), when they laid down their arms and lived in peace with the Government, or both.

179. The Hoopas were not the sole occupants of the Square, either in aboriginal times or thereafter. While the Hoopa Valley was the native territory of the Hoopa Indians, there were native villages of the Yuroks on the Square, in the canyon north of the valley proper, near the junction of the Trinity with the Klamath River, and nearby at a small distance from the river. At about the time of the aforesaid notices by Superintendent Wiley and thereafter, the residents of the valley included at least Hoopa, Klamath, and Redwood or Chilula Indians.

180. The evidence is abundant that the reservation was intended, from the outset, for the accommodation of numbers of tribes of Northern California, including the Klamaths, such as might reside there with Presidential approval, and that Wiley, his successor and the officers of the Indian Office throughout recognized the rightful presence on the Square of a number of tribes (until the opinion of the Deputy Solicitor, in 1958 (finding 174, *supra*), approving the action of the Secretary of the Interior complained of in this case).

181. President Grant's order of June 23, 1876, establishing the Hoopa Valley Reservation "as one of the Indian reservations authorized to be set apart in California by act of Congress approved April 8, 1864" (finding 29, *supra*), established the reservation not for any specific tribe or tribes, none having been mentioned in the order, but for such tribes as might reside or settle there, then or thereafter, with the approval of the President, and the tribes as were then resident upon it were subject to further exercise of Presidential authority under the act with respect to the reservation.

182. The residents of the reservation at the time of Presider Grant's order included Hoopas, Klamaths, Saiaz and Redwoods. Still others (besides bands or sub-groups of

Hoopas) had been settled there between 1864 and 1876, but have not been identified as remaining there in 1876.

183. President Harrison's order of October 16, 1891 (finding 33, *supra*), extending the boundaries of the Hoopa Valley Reservation to include the former Klamath River Reservation and the connecting strip of land between the two reservations, was a lawful exercise of the President's "continuing authority" under the act of 1864, and "large discretion about exercising it," "to alter and enlarge the [reservation] from time to time in the light of experience." *Donnelly* v. *United States*, 228 U.S. 243, 256–57 (1913).

The words of the executive order "extended" the "limits" of the Hoopa Valley Reservation, "a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart * * * by Act of Congress approved April 8, 1864" "so as to include" the Addition, with the proviso that tracts to which valid rights had attached under the laws of the United States were "excluded from the reservation as hereby extended."

The plain and natural effect of the order was to create an enlarged reservation in which the Indians of the original reservation and the Indians of the added tracts would have equal rights in common. Cf. *Halbert* v. *United States*, 283 U.S. 753 (1931); *Quinaielt* v. *United States*, 102 Ct. Cl. 822 (1945). In extending the boundaries of the Square to include the Addition, peopled by Yurok Indians of Northern California, the executive order was patently carrying out the purpose of the act of 1864 to provide a reservation or reservations in the northern district of California for the accommodation of the Indian tribes of the region.

184. An exhaustive study of the background of the executive order of 1891 and of the legislative origins of the Act of June 17, 1892 (27 Stat. 52), providing for allotment and sale of the Klamath River Reservation, shows no sign of a plan, intention or understanding, executive or Congressional, such as is claimed by defendant to have existed, that the executive order of 1891 should join the Klamath River Reservation and the Connecting Strip to the Square for administrative or "technical" purposes only—as separate reservations without effect on the substantive rights of the Indians of the Square, or otherwise than as a single, integrated reservation in which

all the Indians of the reservation as enlarged should have equal substantive rights. The intention defendant contends for is not once articulated in the voluminous history. No fact in the history, moreover, supports the assertion that the executive order was intended for convenience in administration only and without effect on substantive rights.

185. It quite clearly appears that the intended purpose of the executive order was to accomplish just such an enlargement of the Hoopa Valley Reservation as would bring about a single, enlarged, integrated reservation, effective upon substantive rights.

Soon before the issuance of the executive order, the courts had held that the Klamath River Reservation had been abandoned as a reservation and had accordingly refused to punish white traders who entered the reservation area. Also, bills were steadily being proposed to Congress for the public entry and sale of the lands of the Klamath River Reservation. Some of these bills forbade allotment of lands thereon to the Indians as their homes and directed the removal of the resident Indians to the Hoopa Valley Reservation. The Department of the Interior opposed these bills unless they were amended to permit allotment. The Department had two objectives in mind—to allot lands in severalty to the Indians of the Klamath River Reservation and of the Connecting Strip (together constituting what became the Addition), and to expel traders from the Klamath River Reservation. Reservation status for the Addition would achieve both objectives. Only the incorporation of the Klamath River Reservation into an existing reservation would do, for the maximum of four reservations authorized by the act of 1864 had already been created. Incorporation of the Klamath River Reservation and the Connecting Strip into the adjoining Hoopa Valley Reservation was the natural solution; it had been recommended and considered for years before.

Joinder of the Klamath River Reservation to the Hoopa Valley Reservation for administrative purposes only or for less than all purposes would have jeopardized the achievement of the desired objective, in view of the necessity that the executive action pass muster with both courts and Congress, which were both already of the view that Klamath River Reservation had been abandoned, for failure of the executive

to incorporate it into one of the four existing reservations. As for the Connecting Strip, it had never had reservation status, and it could not get such status by a joinder to the Hoopa Valley Reservation "for administrative puposes only" but only by an incorporation, for all purposes, into a lawful reservation. No limitation whatsoever was, therefore, intended or imposed on the natural legal consequence of the incorporation of the Addition into the reservation.

The intention to affect substantive rights is confirmed by the explicit exception, in the text of the executive order (finding 33, *supra*), "from the reservation as hereby extended," of any tract within the Addition to which valid rights under the laws of the United States had already attached. All else was to become part and parcel of the Hoopa Valley Reservation.

The materials cited by defendant do not prove, as claimed, that Congress understood the executive order otherwise or that Congress understood that the reservation was enlarged in such a manner as not to affect the common rights of the Indians of the enlarged reservation in the communal property of all parts of the reservation.

Almost immediately following the executive order, Congress on June 17, 1892 enacted a bill for the allotment of lands on the Klamath River Reservation, to be followed by the public sale of the remaining land, the proceeds of sale to be a fund for the benefit of the Indians of the reservation (finding 77, *supra*). Bills of this nature had been considered for many years on the premise that the Klamath River Reservation was abandoned (see findings 50–77, *supra*); the proponents were not about to make their cause less attractive by amending the name of the reservation to be sold to call it the "former Klamath River Reservation, now part of the Hoopa Valley Reservation." Therefore neither the apparent disregard in the bill of the effect of the 1891 executive order on the Klamath River Reservation (perhaps in fact an ignorance of the issuance of the executive order) nor the continued existence of the fund of the proceeds of sale for the benefit of the Indians of the "Klamath River Reservation" tends to show any such Congressional understanding of the executive order as defendant contends for, or, indeed, a Congressional understanding of any kind concerning the executive order.

The fact is that the act of 1892, the administration over the years of the fund created by the act and the more recent legislative and executive postscript dealings with the "Klamath River Reservation" (findings 157–165, *supra*) were not intended or understood by their draftsmen and makers to have any bearing on the rights of the residents of the Hoopa Valley Reservation as extended by the 1891 executive order. Those men simply did not have the Hoopa Valley Reservation in mind (see finding 77, *supra*); there was no need that they should.

186. The highly complex program for allotments on the Hoopa Valley Reservation which extended from about 1890 to 1930 (findings 78–100, *supra*), too, shows no trace of such a plan, intention or understanding as defendant claims underlay the executive order of 1891. The references to the separate parts of the reservation, in the texts of the instructions to the allotting agents, were simple matters of convenient naming of the three areas of the reservation to be allotted and are wholly immaterial to show a division of the reservation into separate parts for substantive purposes. The restriction of allotments on the Lower Klamath Strip to residents of the Old Klamath River Reservation was the requirement of the act of 1892 (finding 77, *supra*), providing for allotments on that reservation before public sale, reinforced by the provisions of the General Allotment Act of 1887 (finding 59, *supra*). When the question arose of the rights of Indians of the Addition to allotment on the Square, under the executive order of 1891, the Commissioner in 1933 ruled that all Indians of the reservation, Addition and Square, were equally entitled to allotment on the Square (finding 96, *supra*).

The allotment program was marked by other administrative rulings as well, by high and low ranking officials, confirmatory of plaintiffs' position herein. See findings 101–108, *supra*. A notable such ruling was made by Chief Clerk Hauke in 1916 when he gave the opinion (finding 102, *supra*) that not the Hoopas alone but a number of tribes including the Klamaths were entitled to recognition as Indians of the reservation and, therefore, to enrollment upon the reservation and, ultimately, to allotment.

187. The facts of the organizations of Indians on the reservation, prior to the organization of the Hoopa Valley Tribe

in 1950 to claim exclusive rights to the Square, are inconclusive and therefore immaterial on the issue presented. The ad hoc tribal council of 1916 was directed by the Indian Office to be representative of all the tribes on the reservation, including Klamaths, but in fact the council was composed of residents of the Square and though it contained a Klamath among its members unanimously petitioned Washington to exclude Klamaths from eligibility to allotment on the Square. The tribal council created in 1933 was ordered by one Commissioner to be representative of all the tribes on the reservation, but his successor (unknowingly, on the proof here made) approved a council representative of the Square only. And that council proceeded to exercise jurisdiction, both legislative and judicial, over the entire reservation, Square and Addition. Though the council was representative of the Square or the "Hoopa tribe" only, for years at a time Yuroks were its members and chairmen. Even the council's Indian judge, who heard cases arising all over the reservation, was a Yurok (who had been allotted on the Connecting Strip and was a resident of the Square).

188. Nothing appearing to the contrary, and a great deal appearing in support, it is concluded that the effect of the executive order of 1891 was that all the Indians of the reservation as thereby extended—Addition and Square—got equal rights in the enlarged reservation and thus that the rights of Indians of the Addition are equal to those of the Indians of the Square, the Hoopa Valley Tribe or any other Indians of the reservation.

189. It follows that defendant acted arbitrarily in recognizing only the persons on the official roll of the Hoopa Valley Tribe, whose rules exclude from membership most of the Indians of the Addition, as the persons entitled to the income from the unallotted trust-status lands on the Square. Such of the plaintiffs as are found herein to be Indians of the reservation will become entitled to share in the income from the entire reservation, including the Square, equally with all other such Indians, including the Indians of the Square.

Findings on the Individual Plaintiffs

190. The data in this finding were used in determining whether the residences and birthplaces of the individual

plaintiffs were on or off the reservation. The data did not clarify all the cases and in the further proceedings it should be made clearly to appear whether birthplaces and residences are located on or off the reservation.

Villages of the reservation are:

Lower Klamath Strip:

Requa or Rekwoi
Klamath
Hoppaw or Hopau
Waukel or Wohkel
Scaath
Turwar or Terwer
Starwein Flat
Suppur, Serper or Surpur

Connecting Strip:

Johnson's Village or Wauteck
Cautep or Kotep
Pecwan or Pakwan
Yocktar or Yockta—Donley's Prairie
Schragoine or Surgone, Seragoine, Sregon
Mettah or Meta
Natchka or Natchko
Moreck or Murek
Cappell or Kepel
Waase or Waasa or Whusi
Mareep or Merip
Kanick or Kenek
Waseck, Wahsek or Waseek
Martins Ferry
Weitchpec, Wetchpeck or Weitspus

The Square:

Northern Part: Pectah, Pactaw or Pektul
Valley:
Norton Ranch
Mescat, Mascat, Miskut or Meskut Village
Soctish Ranch
Takinitlding Village, Hostler or Hosler
Tsewenalding or Senalton Village
Matilton or Medilding Village
Kentuck or Howunkut Village
Campbell Ranch
Tishtangatang or Djishtangading Village
Bennets Ranch
Spencers Ranch
Jackson Ranch

191. *Jessie Dorothy Bristol Alameda.* Born 1918; ¾ blood Indian (½ Yurok, ¼ Hoopa). Born on the Connecting Strip and schooled there and on the Square. Has lived on the Square full time since 1928. Listed in the reservation censuses from 1919 to 1940, the year of the last complete census. (Entitled to recover as an Indian of the reservation.)

192. *Louisa Dowd Wilder Ames.* Born 1889; ½ blood Indian (¼ Hoopa, ¼ Yurok). Born on the Connecting Strip and schooled there and on the Square. Lived off the reservation from the time she first married, at a date which does not appear, to 1964. Has lived on the reservation since then. Was allotted on the Connecting Strip and was listed in all censuses from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

193. *Rethema Billy Peters Pollock Barber.* Born 1913; full-blooded Indian (Yurok). Born on the Square and lived there until she was 8, when she moved with her family to her grandmother's allotment on the Connecting Strip. Lived on the Connecting Strip to a date later than 1922, lived on the Square between 1936 and 1939, and now lives on the Connecting Strip. She has held an assignment of land on the Square, later transferred to her daughter, and was listed in the censuses from 1914 to 1940. (Entitled to recover as an Indian of the reservation.)

194. *Lulu Smith Donnelly.* Born 1883; full-blooded Indian (Yurok). Born on the Connecting Strip and lived there until 1966. Since then has lived off the reservation. Allotted on the Connecting Strip and listed in the censuses from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

195. *Frank A. Donley,* also known as Frank Douglas. Born 1891; ½ blood Indian (Yurok). Born on the Connecting Strip and lived there for 50 years. Now lives on the Lower Klamath Strip. Allotted on the Connecting Strip. Listed in the censuses for 1894, 1900, and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

196. *Ollie Roberts Sorrell Foseide.* Born 1921; full-blooded Indian (⅞ Yurok, ⅛ Hoopa). Born on the Connecting Strip, lived there and schooled there and on the Square. Has lived on the Lower Klamath Strip and on the Connecting Strip.

She was listed on the censuses from 1921 to 1940. (Entitled to recover as an Indian of the reservation.)

197. *Ella Steve Hostler Johnson.* Born 1900; full-blooded Indian (Yurok). Born on the Connecting Strip. Lived on the Square from 1916 to 1933 and thereafter on the Connecting Strip. She selected lands on the Square; the selection was later transferred to one of her sons. Two of her sons and her husband were allotted lands on the Square. She was listed on the censuses in 1900 and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

198. *Henrietta Wilma Masten Lewis.* Born 1942; 5/8 blood Indian (Yurok). Born off the reservation. Her father was 1/4 Indian (Yurok) and her mother was 100% Yurok, a native of the Connecting Strip. The plaintiff was born after the last complete census. Both her parents were listed on the censuses from 1920 to 1940. Schooled on the reservation. Has lived "most of her life" on the Connecting Strip. (Case to be retried because of the inconclusive nature of the data. New briefs should discuss the effect of birth off the reservation as affecting status, and the facts as to duration of residence off the reservation, and their significance.)

199. *Llewellyn Markussen.* Born in 1932; 3/4 blood Indian (1/2 Yurok, 1/4 Karok). Born on the Square and lived there as an infant. From the age of 4 in 1936 until 1961 he lived on his mother's assignment on the Square. Since then he has lived on the Connecting Strip. He was omitted from the censuses because his mother had never been listed. His mother was on her application enrolled as an Indian of the reservation in 1936 and was thereafter listed. (Entitled to recover as an Indian of the reservation.)

200. *Theresa Billy Mitchell.* Born 1891; full-blooded Indian (Yurok). Born on the Connecting Strip, lived on the Square as a child and since then has lived, for more than 50 years, on the Connecting Strip, where she was allotted. Listed in the censuses in 1900 and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

201. *George McCovey, Sr.* Born 1917; 3/4 blood Indian (Yurok). Born and schooled on the Connecting Strip. Lived on the Square from the time he was married in 1937 to 1969, when he returned to the Connecting Strip where he now lives.

Listed in the censuses from 1918 to 1940. (Entitled to recover as an Indian of the reservation.)

202. *Myrtle Smoker McCovey.* Born in 1899; full-blooded Indian (Yurok). Born on the Connecting Strip and schooled there, on the Square and elsewhere. Lived on her grandmother's allotment on the Lower Klamath Strip from 1919 to 1964 and then moved to Klamath Glen, apparently also on the Lower Klamath Strip. She was listed on the censuses in 1900 and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

203. *Sadie Jones McCovey.* Born 1891; full-blooded Indian (Yurok). Born on the Connecting Strip and lived there. Schooled there and on the Square. Has lived with her husband on his allotment on the Connecting Strip since her marriage in 1915. Has been listed on the censuses from 1915 to 1940. (Entitled to recover as an Indian of the reservation.)

204. *Antone Obie.* Born 1890; full-blooded Indian (Yurok). Born on the Connecting Strip where he lived until 1964 and where he was allotted. In 1964 he moved to Hoopa where he now lives. Listed in the censuses in 1900 and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

205. *Erick William Pearson, Jr.* Born 1931; 3/8 blood Indian (Yurok). Born in Lassen County, California of parents one of whom was a non-Indian and the other a 3/4 Indian (Yurok) native of the Square. He came to the Square at the age of 2, in 1933, and lived on land assigned to his mother in 1935. Moved in 1937 to a tract on the Square bought by his mother. Has lived on the Square since, except for military service between 1949 and 1951. He was listed on the 1940 census. (Case to be retried because of the inconclusive nature of the data. New briefs should discuss the effect of birth off the reservation as affecting status.)

206. *Frances James Roberts.* Born 1898; full-blooded Indian (3/4 Yurok, 1/4 Hoopa). Born on the Connecting Strip and has lived on the Square, the Connecting Strip, and the Lower Klamath Strip. Listed on the censuses for 1900 and from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

207. *Josephine Cooper Robinson Rogers Ludington Robinson.* Born 1896; 3/4 blood Indian (1/2 Yurok, 1/4 Wintun).

Born on the Square and lived on the Connecting Strip (except for a "short time" during her marriage) until 1959 when, apparently, she moved to Eureka, off the reservation. She had been omitted from the census and successfully applied for enrollment in 1933, whereupon she was able to accept an assignment on the Connecting Strip. She was listed on the censuses from 1934 to 1940. (Entitled to recover as an Indian of the reservation.)

208. *Alta Mae Kane Rogers.* Born 1933; full-blooded Indian (½ Yurok, ½ Paiute). Born on the Square and lived there and on the Connecting Strip until 1939 when she moved to her father's reservation, the Bishop Indian Reservation. In 1953 she married and, with her husband, moved to the Connecting Strip and lived there until about 1966 when she and her husband moved to Bishop, California. Occasionally visits her cabin on the reservation. She was listed on the censuses from 1933–1940. (Case to be retried because of the inconclusive nature of the data. New briefs should discuss whether claimant has dual tribal status and, if so, the effect on the issue in the case.)

209. *Florence Gensaw Green Shaughnessy.* Born 1902; ½ blood Indian (Yurok). Born on the Lower Klamath Strip and has lived there for 60 years except for "intermittent" periods of residence in the Humboldt Bay Area. Listed in the censuses 1910 through 1940. (Entitled to recover as an Indian of the reservation.)

210. *Jessie Quinn McCoy Short.* Born 1905; ½ blood Indian (¼ Hoopa, ¼ Yurok). Born on the Connecting Strip and lived there as a child and after schooling at Hoopa. Presently resides off the reservation. Listed on the censuses 1910 through 1940. (Entitled to recover as an Indian of the reservation.)

211. *Sam Smoker.* Born 1904; ¾ blood Indian (Yurok). Born on the Square and schooled there and on the Lower Klamath Strip. Has lived on the Square from 1914 to the present. He received a tract of land by assignment in 1935. Listed on the censuses 1910 through 1918. He was thereafter omitted until his application for enrollment was made and approved in 1932. Thereafter he was again listed, from 1932 through 1940. (Entitled to recover as an Indian of the reservation.)

212. *Elwood Theodore Swanson.* Born 1926; ⅛ blood Indian (Hoopa). Born off the reservation. Lived part time with his grandmother at Hoopa from the time he was 8. At an unstated time his family moved to Hoopa and he completed grade and high school there; in that period he participated in Hoopa tribal ceremonial dances. He lived on the reservation until his military service; thereafter lived at his birthplace off the reservation. He inherited interests in three allotments on the reservation and sold them. (Case to be retried because of the inconclusive nature of the data. New briefs should discuss the effect of birth off the reservation as affecting status.)

213. *Oscar Lawrence Taylor.* Born 1908; half-blood Indian (Yurok). Born on the Lower Klamath Strip, schooled there and at Hoopa. Since then has lived on the Lower Klamath Strip and for a time on the Connecting Strip, except when he was working off the reservation. Listed on the census rolls from 1910 to 1940. (Entitled to recover as an Indian of the reservation.)

214. *Harry D. Timm Williams.* Born 1924; half-blood Indian (Yurok). Born on the Lower Klamath Strip and lived there through high school until 1941 when he moved to the San Francisco area where he took university extension courses. Spends weekends and vacations with his family on the reservation. Listed on the censuses 1930 through 1940. (Entitled to recover as an Indian of the reservation.)

215. *Christopher Young.* Born 1897; half-Indian (Yurok). Born on the Connecting Strip and has lived there all his life. Presently lives there. Listed in the censuses 1900 and 1910 through 1940. (Entitled to recover as an Indian of the reservation.)

216. *Laura Mareep Sam Billy Young.* Born 1891; full-blooded Indian (Yurok). Born and has lived on the reservation all her life, except while attending an Indian school. Listed on the censuses in 1900 and 1910 through 1940. (Entitled to recover as an Indian of the reservation.)

Ultimate Findings and Conclusions on the Individual Claims

217. Plaintiffs Louisa Dowd Wilder Ames, Jessie Dorothy Bristol Alameda, Rethema Billy Peters Pollock Barber, Lulu

Smith Donnelly, Frank A. Donley, Ollie Roberts Sorrell Foseide, Ella Steve Hostler Johnson, Llewellyn Markussen, Theresa Billy Mitchell, George McCovey, Sr., Myrtle Smoker McCovey, Sadie Jones McCovey, Antone Obie, Frances James Roberts, Josephine Cooper Robinson Rogers Ludington Robinson, Florence Gensaw Green Shaughnessy, Jessie Quinn McCoy Short, Sam Smoker, Oscar Lawrence Taylor, Harry D. Timm Williams, Christopher Young, and Laura Mareep Sam Billy Young are entitled to recover, as Indians of the Hoopa Valley Reservation, an aliquot share in the revenues of the unallotted trust-status lands of the entire reservation, in an amount to be determined in proceedings under rule 131(c), the amount of recovery to be determined following trial of the claims of the remaining plaintiffs.

218. The claims of plaintiffs Henrietta Wilma Masten Lewis, Erick William Pearson, Jr., Alta Mae Kane Rogers and Elwood Theodore Swanson are set down for retrial.

CONCLUSION OF LAW

The court adopts and makes part of its judgment the foregoing findings of fact and ultimate findings and conclusions. Certain of the plaintiffs are entitled to recover in amounts to be determined under Rule 131(c), and the claims of the others are set down for retrial in accordance with the opinion. The case is remanded to the trial judge for further proceedings.

U.S. GOVERNMENT PRINTING OFFICE: 1973

APPENDIX B

Act of April 8, 1864
(13 Stat. 39)

Sec. 2. *And be it further enacted*, That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: *Provided*, That at least one of said tracts shall be located in what has heretofore been known as the northern district: *And provided, further*, That if it shall be found impracticable to establish the reservations herein contemplated without embracing improvements made within their limits by white persons lawfully there, the Secretary of the Interior is hereby authorized and empowered to contract for the purchase of such improvements, at a price not exceeding a fair valuation thereof, to be made under his direction. But no such contract shall be valid, nor any money paid thereon, until, upon a report of said contract and of said valuation to Congress, the same shall be approved and the money appropriated by law for that purpose: *And provided, further*, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its [sic] complete adaptation to the purposes for which it is intended.

Sec. 3. *And be it further enacted,* That the several Indian reservations in California which shall not be retained for the purposes of Indian reservations under the provisions of the preceding section of this act, shall, by the commissioner of the general land-office, under the direction of the Secretary of the Interior, be surveyed into lots or parcels of suitable size, and as far as practicable in conformity to the surveys of the public lands, which said lots shall, under his direction, be appraised by disinterested persons at their cash value, and shall thereupon, after due advertisement, as now provided by law in case of other public lands, be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry, according to such regulations as the Secretary of the Interior may prescribe: * * *

APPENDIX C

June 17, 1892.

CHAP. 120.—An act to provide for the disposition and sale of lands known as the Klamath River Indian Reservation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided,* That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided,*

Klamath River Reservation, Cal.

Opened to settlement.

Provisos.

Allotments to Indians.
Vol. 25, p. 388.

Exemption of settled lands.

That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon

Indian villages.

which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the

Homestead entries.

benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first

in order of time: *Provided*, That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: *And provided further*, That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further*, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Mineral lands.

Rights of settlers' heirs.

Disposal of proceeds.

Approved, June 17, 1892.

APPENDIX D

Executive Order of June 23, 1876
(1 Kappler 815)

It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed in 1875 by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: "Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked "H.V.R. No. 3"; thence south 17½° west, 905.15 chains, to southeast corner of the reservation; thence south 72½° west, 480 chains, to the mouth of Trinity River," be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (13 Stats. p. 39.)

APPENDIX E

Executive Order of October 16, 1891
(1 Kappler 815)

EXECUTIVE MANSION, *October 16, 1891.*

It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats. 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.

BENJ. HARRISON.

APPENDIX F

Treaty of peace and friendship between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians.

ARTICLE I.

Sec. 1. The United States government, through Austin Wiley, superintendent of Indian affairs for the State for California, by these presents doth agree and obligate itself to set aside for reservation purposes for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of Hoopa valley, to be held and used for the sole benefit of the Indians whose names are hereunto affixed as the representatives of their tribes.

Sec. 2. Said reservation shall include a sufficient area of the mountains on each side of the Trinity river as shall be necessary for hunting grounds, gathering berries, seeds, &c.

Sec. 3. The United States government shall provide suitable clothing and blankets for the men, women, and children, which shall be distributed each year by the agent in charge.

Sec. 4. Suitable instructions shall be given the squaws to enable them to make their own clothing, take proper care of their children, and become generally efficient in household duties.

Sec. 5. An agent and a sufficient number of employes to instruct the Indians in farming and harvesting shall be appointed. to reside upon the reservation, and no other white men shall be permitted to reside upon said reservation, except such as are in the military service of the United States or employed in government service.

Sec. 6. A physician shall be appointed to reside upon the reservation, whose duty it shall be to minister to the wants of the sick and look to their health and comfort.

ARTICLE II.

Sec. 1. All Indians included among those subscribing to this treaty must obey all orders emanating from the agent in charge.

Sec. 2. No Indians belonging to either of the tribes herein enumerated shall go beyond the limits of said reservation without a written pass from the agent in charge. All so offending shall not be deemed friendly, and shall be hostile Indians.

Sec. 3. All Indians who have taken part in the war waged against the whites in this district for the past five years shall be forgiven and entitled to the same protection as those who have not been so engaged.

Sec. 4. All guns and pistols shall be delivered to the commanding officer at Fort Gaston, to be held in trust by him for the use and benefit of the Indians, to be used by them in hunting only, in such numbers and for such length of time as the agent may direct. All ammunition in their charge to be turned over to the agents and paid for at its actual value in Indian money.

APPENDIX G

RIGHTS OF INDIANS IN THE HOOPA VALLEY RESERVATION, CALIFORNIA

Indian Tribes: Tribal Government

The Commissioner of Indian Affairs has been correct, as a matter of law, in recognizing tribal title to the communal lands of the 12-mile square Executive order reservation in the Hoopa Valley Tribe. The Commissioner has been further correct in paying out per capita payments as authorized generally by the act of March 2, 1907 (34 Stat. 1221), to enrolled members of the Hoopa Valley Tribe only.

Indian Lands: Tribal Lands: Generally—Indian Tribes: Tribal Government

Nothing in the Executive Order of October 16, 1891, indicates an intent to confer upon the Klamath River Indians an interest in the realty of the original Hoopa Valley Reservation. Despite the enlargement of the original Hoopa Valley Reservation, the Klamath River Tribe was never merged with nor absorbed into the Hoopa Valley Tribe. Therefore the fact that the Hoopa Valley Tribe limited the scope of its jurisdiction under its 1949 constitution does the Klamath River Indians no injustice. As an independent tribal group, neither the Klamath River Indians nor their successors, the Yuroks, have any property right in the original 12-mile square.

Indian Lands: Possessory Rights

It would be an unconstitutional taking to permit the Klamath River (Yurok) Indians to diminish the value of the right of occupancy in Hoopa Valley by paying to them a part of the proceeds of the resources taken therefrom. The Hoopa Indians have occupied this part of the reservation since 1865 and the benefits of such occupancy belong to them.

Indian Tribes: Reservations

Inasmuch as the Indian Reorganization Act provided a method of uniting the Hoopa and Klamath River Tribes, and both tribes rejected such a plan, it is our opinion that these groups remain and must be recognized as independent tribal groups until such time as they affirmatively and voluntarily form a consolidated governmental body having jurisdiction over the total reservation both as to government and as to economic resources. Such a confederation or consolidation has not taken place.

M-36450 FEBRUARY 5, 1958.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

This opinion is given in response to your request for a determination of the legality of recent per capita distributions to members of the Hoopa Valley Tribe of California. The per capita payments were made by request of the recognized governing body of the Hoopa Valley Reservation. Recipients are those persons whose names appear on the tribal membership roll approved by the Commissioner on March 25, 1952. The official membership roll approved October 1, 1949, contains the names of allottees, their descendants, unallotted residents of the 12-mile square area of Hoopa Valley who were eligible to receive allotments at the time the allotments were made, and other persons made members of the tribe by adoption.[1]

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[1] Constitution and Bylaws of Hoopa Valley Tribe in California, article IV, *Membership*, approved September 4, 1952. See Appendix 1, p. 69. *Cf.* also letter of Superintendent Boggess to Commissioner on January 13, 1947, re Hoopa Business Council resolution declaring all lands and resources of 12 miles square to be property of Hoopa Valley Indians alone.

It has been contended on behalf of certain members of the Yurok Tribe that Indians and their descendants who were allotted on lands formerly known as the Klamath River Reservation and on that portion of the enlarged Hoopa Valley Reservation commonly referred to as the "Connecting Strip" or "Extension" are entitled to share equally in the payments from the proceeds of timber sales on the area comprising the original Hoopa Valley Reservation. It is further alleged that the Bureau of Indian Affairs improperly authorized the disbursal of per capita payment money at the request of the Hoopa Valley Business Council because the Hoopa Valley Tribal Constitution under which it acts is invalid.

A group of Indians had been politically recognized as a Hoopa Tribe by the United States as early as 1851 when a treaty was negotiated with the "Hoo-pah" or, as they were sometimes otherwise called, the Trinity River Indians. Although this treaty was never ratified, it is convincing evidence of the existence of a Hoopa tribal group. Later, this tribal group exercised the rudiments of community government over the Indians of an area comprising the 12-mile square original Hoopa Valley Reservation and were thus qualified for political recognition as a tribe occupying the reserved group. We have seen no evidence, or contention, that any other tribal group claimed, at that time, any governmental or economic jurisdiction over the 12-mile square area of the original Hoopa Valley Reservation.

Subsequent to the admission of California as a State, the announced intent of Congress was to collect the various groups of Indians in California and to locate them on reservations set aside to afford protection against the encroachment of white settlers. On April 8, 1864 (13 Stat. 39), Congress authorized the President, in his discretion, to set aside not more than four tracts of land in California to be retained by the United States as In-

dian reservations, suitable in extent to accommodate the Indians in that State. The lands were to be located as remote from white settlements as possible, having due regard for their adaptability for the purpose for which they were intended. The act further provided that at least one of the reservations be located in what had theretofore been known as the "Northern District." Pursuant to this act, the Hoopa Valley Reservation was established as one of the four reservations contemplated by the legislation.

Administrative actions looking toward the setting aside of this area as an Indian reservation were begun on August 21, 1864; and by 1865 a number of Hoopa Indians had already been located in Hoopa Valley which was formally reserved by Executive order in 1876.

The Executive order establishing the Hoopa Valley Reservation provided:

> EXECUTIVE MANSION, June 23, 1876. It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River, surveyed in 1875 by C. T. Bissel, and the courses and distances of the east boundary, and the portion of the north boundary east of Trinity River reported but not surveyed by him, viz: Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked "H. V. R., No. 3"; thence south 17½° west 905.15 chains to southeast corner of the reservation; thence south 72½° west 480 chains to the mouth of Trinity River, be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart in California by act of Congress approved April 8, 1864. (13 Stats., p. 39.)
> U. S. GRANT.

It should be noted that this Executive order designates no particular tribe or class of Indians as the inhabitants of the area set aside. The order, therefore, must be construed as setting aside the reserve for the benefit of any Indians who were then occupying the area and those who availed themselves of the opportunity for settlement which the reservation presented from time to time. When the President formally set the boundaries of the Hoopa Valley Reservation on June 23, 1876 a "Hoopa Tribe," composed of remnants of the Hunstang, Hupa, Redwood, Saiaz, Sermalton, Miskut, and Tishtang-a-tan bands of Indians, was already well established thereon. This tribe became stabilized in the area and somewhere along the line adopted a constitutional form of government and ever since has maintained its local integrity. The records of the Indian Bureau show that by 1916 the group was well organized with a representative tribal council.

> This [Hoopa] council is composed of Indians living on the Hoopa Valley Reservation proper and represents all of the tribes not now extinct enumerated in the Act of Congress and presidential proclamation setting aside this as an Indian Reservation * * *. The Hoopa Council are the duly authorized representatives of the Indians in Hoopa Valley Reservation.[2]

The "Hoopa Valley Tribe" has continually exercised tribal governmental functions within the confines of the Hoopa Valley Reservation as established by the Executive Order of June 23, 1876, and is the proper organization for carrying on the functions of administering and managing whatever communal property or land may be owned or beneficially held by that tribe. We note that the tribe in 1949 adopted a written constitution which apparently fairly included as members all persons enrolled on the

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[2] Letter from Superintendent Morsdolf to Commissioner of Indian Affairs, June 19, 1916.

official roll of the Hoopa Valley Tribe and all children, of at least one-quarter Indian blood, born to such members.

We conclude, therefore, that as a matter of law the Commissioner of Indian Affairs has been correct in recognizing tribal title to the communal lands in the 12-mile square reservation to be in the Hoopa Valley Tribe. Cf. *Spalding* v. *Chandler*, 160 U.S. 394 (1896), 34 Op. Atty. Gen. 181 (1924). The superior title of the Government in tribal lands and in allotted lands where no patents have been issued, implies, of course, wise management. It does not confer on the Government the right to despoil a tribe or an allottee of accrued rights. *St. Marie* v. *United States*, 24 F. Supp. 237, 240 (1938). The Commissioner has been correct in paying out per capita payments, authorized by the act of March 2, 1907 (34 Stat. 1221), only to enrolled members of the Hoopa Valley Tribe. This action is consonant with the principle that the test of the privilege of an individual Indian to share in tribal resources is tribal membership. *Halbert* v. *United States*, 283 U.S. 753 (1931).

We now turn our attention to the contention that Indians other than the enrolled members of the Hoopa Valley Tribe have a claim of right to an interest in the communal lands and resources of the Hoopa Valley Reservation because the 12-mile square reservation was enlarged by the addition of a contiguous area of land on which Indians of other bands were residing.

The first pertinent act of Congress providing for reservations for the Indians of California was the act of March 3, 1853 (10 Stat. 238). This act authorized the President to "make five military reservations from the public domain in the State of California * * * for Indian purposes." The act limited the area which might be reserved to 25,000 acres and appropriated $250,000 for subsistence and costs of removing the Indians to the

reserved areas. One of the areas so reserved was the Klamath River Reservation established November 16, 1855, by the Executive order of President Franklin Pierce.

In the year 1861, a flood destroyed the arable lands of the Klamath River Reservation and some of the Indians located thereon were removed to a new temporary reservation known as the Smith River Reserve, established May 3, 1862. A majority of these Indians preferred to reside on the old reservation, however, and nearly all of them returned within a few years to the Klamath River area. Meanwhile, by the act of April 8, 1864, *supra*, the State of California was constituted one superintendency for the administration of Indian affairs and the President was authorized to set apart four additional tracts of land within the State for Indian purposes. There were already in existence at that time the following reservations: Klamath River, Mendocino and Smith River. Both the Mendocino and Smith River reservations were later discontinued by the act of July 27, 1868 (15 Stat. 221, 223). During this time, the Klamath River lands were treated as a distinct reservation administered by an Indian agent of the United States who also oversaw the affairs and development of the Hoopa Valley Reservation approximately 20 miles away. As an aid to the administration of these two separated areas, they were brought together later under the Executive Order of October 16, 1891, which reads as follows:

> EXECUTIVE MANSION, October 16, 1891. It is hereby ordered that the limits of the Hoopa Valley Reservation, in the State of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart in said State by act of Congress approved April 8, 1864 (13 Stats., 39), be, and the same are hereby, extended so as to include a tract of country 1 mile in width on each side of the Klamath River, and ex-

tending from the present limits of the said Hoopa Valley Reservation to the Pacific Ocean: *Provided, however,* That any tract or tracts included within the above-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended. BENJ. HARRISON.

The limits of the Hoopa Valley Reservation were thus extended by the Executive Order of October 16, 1891, to include a tract of land containing approximately 25,635 acres, 1 mile in width on each side of the Klamath River, extending from the limits of the Hoopa Valley Reservation to the Pacific Ocean. This enlarged Hoopa Reservation took a shape similar to that of a spoon with the Hoopas located in its bowl and the Klamath River Indians strung out along its handle. The following year, under the act of June 17, 1892, Congress discontinued the Klamath River Reservation as such, but preserved some rights for Indians previously located on that reservation by providing for allotments to all Indian applicants who made their selection thereon within 1 year. All lands not selected for allotment were opened to settlement under the public land laws. Indians who removed from the former Klamath River Reservation were relocated on the connecting strip and elsewhere, and the Klamath River Tribe became widely scattered.

The Klamath River Indians, whose ancestors formerly resided on the Klamath River Reservation, have consistently been regarded as an identifiable tribe by the Federal Government. See 33 L. D. 205, 218 (1904). These Indians are also included in the general term "Yurok" meaning downstream Indians although a Yurok Tribe, as such, was not organized until recent years. The "Yurok Tribe" has never been recognized as having jurisdiction over any part of the "Hoopa Extension"

because its membership is not confined to reservation Indians.[3]

We can find no evidence to indicate that the enlargement of the reservation was intended in any way to upset the property interests of the Hoopa Tribe to the original area under its jurisdiction. We read nothing in the Executive Order of 1891 to show an intent to confer upon the Klamath River Indians an interest in the realty of the original Hoopa Valley Reservation.

The former Klamath River Reservation and the connecting strip are, technically, a part of the enlarged Hoopa Valley Reservation. However, to construe the order enlarging the Hoopa Valley Reservation as divesting the Hoopa Valley Tribe of their rights in their communal property would be contrary to established law. The rights of Indians to property within reservations attach when the lands are set aside. 34 Op. Atty. Gen. 171, 176 (1924). *United States* v. *Santa Fe Pacific R. R. Co.*, 314 U.S. 339 (1941). The rights of the Hoopa Indians to the Hoopa Valley Reservation antedate the Executive Order of 1891. Such vested rights in the land are not affected, without the tribe's consent, by a subsequent order enlarging the area of the reservation. To distribute the income from the assets of the original part of the Hoopa Valley Reservation to all the Indians in the Northern District of California would be to give to many of them the benefit of a right to which they are not entitled. Congress, as a trustee for unassimilated Indians, has power to legislate for the proper control and management of such of their property as is held by the Government in a trust capacity, but this power is not so extensive as to enable the Government "to give the tribal

[3] Yurok Tribe, incorporated under laws of California, October 24, 1949. The organization is recognized for the purposes for which it was formed namely "to promote the cultural, social, educational and economical well being of members of the Yurok Tribe." Letter from Assistant Commissioner to Mrs. Lowana Brantner, November 26, 1954.

lands to others, or to appropriate them to his own purposes, without rendering, or assuming an obligation to render, just compensation * * *; for that 'would not be an exercise of guardianship, but an act of confiscation.'" *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935), citing *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307-308 (1902). Cf. *United States* v. *Klamath and Moadoc Tribes et al.*, 304 U.S. 119 (1938). It would be an unconstitutional taking diminishing the value of the Hoopa Indians' right of occupancy, if the Klamath River (Yurok) Indians were permitted to share the proceeds of the resources taken from the 12-mile square. The Hoopa Indians have occupied the 12-mile square area of the reservation since 1865 and the benefits of such occupancy belong to them. *Shoshone Tribe* v. *United States*, 299 U.S. 476, 496 (1937). Each and every individual member of the many tribes or bands of California Indians was privileged after 1865 to settle upon this reservation. None of them was required to do so. Those who accepted became vested with the full incidents of Indian title. Those who did not accept, and chose to remain where they were, or move elsewhere, cannot be properly regarded as being invested with enforceable rights thereon either in themselves or in their posterity. *Cf.* Sol. Op. M-36181, Ownership of Unallotted Lands on the Tulalip Indian Reservation in the State of Washington, February 21, 1956.

It has been alleged that the Hoopas withdrew from an existing Hoopa-Klamath tribal organization without knowledge or consent of the Klamaths. In view of the history of these tribes as set out above, that assertion is not well founded. On the contrary, the Klamath River Tribe was never merged with nor absorbed into the Hoopa Valley Tribe. Therefore, the action by which the Hoopa Valley Tribe limited the scope of its jurisdiction

under its 1949 constitution does the Klamath River Indians no injustice.

The Hoopa Indians have actively attempted for more than half a century to preserve their interests in the Hoopa Valley Reservation and to keep the Klamath River Indians, and any others, from acquiring any tribal right in the area of the original 12-mile square. There is nothing in the records to indicate a recession from the position they held before Klamath River lands were annexed to the Hoopa Valley Reservation. A study of the various actions taken in connection with the allotment of land on the reservations discloses the active resistance of the Hoopa Tribe to the encroachment and claims of other tribes and other Indians. At a time when a number of outsiders were attempting to obtain allotments at Hoopa Valley, the tribal council, anxious to preserve the reservation for Indians of the Hoopa Tribe, stated in a letter dated June 19, 1916, to the Commissioner of Indian Affairs:

> There are certain tribes that are regarded as having tribal rights on the Hoopa reservation. This we cannot understand. Take the Klamath for instance —they represent a different tribe, talk a different language, and have never associated with the Hoopas to amount to anything. As near as we can understand the Hoopa and Klamath River reservation were allotted twenty some odd years ago. The Klamath are today enjoying the rights of their allotments, own their lands and homes. While the Hoopas have had their land resurveyed and are now waiting to receive their allotments and are still uncertain about our land, and still they say we are linked with the other tribes—surely there must be a mistake somewhere * * *.

In reply, the Indian Bureau stated that only those persons enrolled as Indians on the Hoopa Valley Reservation or voluntarily adopted by the tribal business committee

could be granted "any benefits whatever as Indians of the Hoopa Valley Reservation." [4] Allotment rolls for Hoopa Valley were closed in 1923, but were subsequently reopened when other surveys were subsequently made in 1929 and 1933.

In May of 1932, the Superintendent wrote to the Commissioner requesting definite instructions for the allotting of the Hoopa Valley. At that time about 175 selections of land for allotment had been on file at the agency for a period of nearly 5 years, and many Indians were in possession of definite tracts and had improved such lands. With respect to the situation on the reservation, the Superintendent made this observation:

> The Office should understand that the great majority of these Indians feel that the Klamath and the Hoopa countries are separate and distinct and there is no fixed desire on the part of the Hoopas to take over any unallotted Klamath lands, and the great majority of the Klamaths have no desire to come in and take over Hoopa country. I am not unmindful of previous statements that have been made to me by the Office to the effect that it is considered by the Office as one reservation only.

The reply to this letter announced that a representative of the Commissioner was on his way to the reservation and would "go over the situation * * * on the ground." [5]

Shortly thereafter, special allo ng agent Charles E. Roblin was sent to Hoopa Valley to study the matter and report his views. The Roblin report, dated November 19, 1932, recommended that further allotments be authorized on the Hoopa Valley Reservation but that such allotments be limited to the agricultural lands, with the

[4] Letter from Chief Clerk, Indian Bureau, to Superintendent, Hoopa Valley School, July 17, 1916.

[5] Letter to Superintendent from Assistant Commissioner, dated September 16, 1932.

right to such allotments given only to those who had already occupied and improved these lands for beneficial use. Two months later, in a supplemental report, Agent Roblin withdrew his recommendation that actual use be a condition precedent to allotment and recommended that claimants whose selections covered surveyed lands have their selections confirmed, provided that the individual's enrollment on the Hoopa Valley Agency rolls was regular and that he was entitled to allotment. Roblin further stated that among the Indians, a sentiment of urgency prevailed "based largely on a desire of the Hoopa Indians to exclude the Klamath River and Lower Klamath Indians from allotment on the original Hoopa Valley Reservation." It was Roblin's opinion "that the objection to the rights of these claimants *as a class*, should be disregarded." The Commissioner agreed that Indians from the "Connecting Strip" and the former Klamath River Reservation should be allotted equally with those already living on the original Hoopa Valley Reservation, but conceded that there was not sufficient available land to allot all these Indians thereon. Therefore, he approved only the allotment schedules which had been previously submitted by the Hoopa Tribal Council in 1921 stating, "after the schedules referred to above, no further allotments at Hoopa Valley will be made at this time." All unallotted lands were then held for tribal use under a proposed Indian Reorganization Act.

Subsequently, on November 20, 1933, the Commissioner of Indian Affairs approved a constitution and bylaws of the Hoopa Business Council which provided in part:

> Article III. The business council shall be composed of seven enrolled members of the Hoopa tribe; bona fide residents of Humboldt County, California, and twenty-one years of age or over.

The council represented only the Indians of the 12-mile square Hoopa proper. The Klamath River Extension was

not represented on this council, and has not been represented there since.

As a result of the enactment of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 986), a question arose as to whether a single referendum should be held on the enlarged Hoopa reservation; or whether separate elections should be held on the two areas permitting each section to determine its own destiny. On October 20, 1934, Commissioner John Collier communicated his decision to Mr. Roy Nash, District Coordinator for Reorganization Act in a letter containing the following sanction:

> Superintendent Boggess is authorized to hold two separate elections on the Hoopa Valley Reservation, one of them on Hoopa Valley proper for the Hoopa, and another election on the territory occupied by the Klamath Indians, when the Secretary calls such election.

The records further show that on December 15, 1934, the Indians on the Hoopa Valley Reservation voted to make the Indian Reorganization Act inapplicable on that reservation. The Klamath River Indians also opposed the application of the act to lands occupied by themselves. Thus, in two separate elections, which might have resulted in more closely tying the extension lands with the original 12-mile square area, both the Hoopa Indians and the Klamath River Indians defeated the reorganization measure. The total of votes for each of these tribes is recorded separately.[6]

Inasmuch as the Indian Reorganization Act provided a method of uniting the Hoopa and Klamath River tribes, and both tribes rejected such a plan, these groups remain and must be recognized as independent tribal groups

[6] Haas, "Ten Years of Tribal Government Under I. R. A.," U.S. Indian Service, 1947, p. 14.

until such time as they affirmatively and voluntarily form a consolidated governmental body having jurisdiction over the entire reservation. Such a confederation or consolidation has not taken place.

In summary, it is our opinion that the contentions on behalf of the Yurok Indians have not been substantiated, and that the Bureau of Indian Affairs has properly carried out its responsibilities in the premises. In reply to your specific questions, no Indians other than those enrolled as members of the Hoopa Tribe of the original 12-mile square reservation and their descendants, have rights of participation in the communal property on that part of the Hoopa Valley Reservation.

The Indian inhabitants of the Hoopa extension and the other areas outside the jurisdiction of the Hoopa Valley Tribe may associate as a separate Indian tribe, or tribes, under constitutions acceptable to them and to the Bureau of Indian Affairs. But no such association can work to vest such Indians with an interest in the Hoopa Valley proper.

EDMUND T. FRITZ,
Deputy Solicitor.

APPENDIX H

BUREAU OF INDIAN AFFAIRS
Office of Economic Development
Real Estate Services
Real Property Management

ANNUAL REPORT ON INDIAN LANDS

June 30, 1971

Compiled by: Betty Jo Counselman
As of June 30, 1971

SUMMARY OF INDIAN RESERVATIONS

The number of Indian-owned trust or restricted land areas currently having some degree of Federal supervision under programs of the Bureau of Indian Affairs are as follows:

Continental United States

Those areas commonly referred to and which have been designated as "reservations" total 265. Included in this broad category are the well-known reservations, together with the rancherias, pueblos, colonies or communities. There are 136 reservations containing only tribal-owned lands, 7 containing only individually-owned allotted land, and 122 reservations comprise of both tribal and allotted lands.

Sixteen areas contain widely scattered public domain allotments which for reporting purposes have been combined. Two of these have the public domain allotments in a fairly compact group and have been designated according to the community name as the Burns Paiute Band and the Dallas Unit in Oregon.

Sixteen reported groups of other off-reservation lands are closely supervised by Bureau agencies located on reservations. Of these off-reservation lands, 7 scattered groups were purchased by members of the Osage Tribe and are located in 7 different States.

There are 22 Government-owned tracts of land outside reservations on which miscellaneous facilities have been constructed for Indian use or administrative activities. These sites include the United Tribe Center of Burleigh County, North Dakota; Celilo Village Fishing Sites, Oregon and Washington; Wildhorse Reservoir, Nevada; and various non-reservation boarding schools, dormitories, and a sanitorium.

Alaska

There are 2 Communities with tribal or Community owned land (Metlakatla and Klukwan) and 99 Communities and reserves with Government-owned land. There are 200 individually-owned Native allotments throughout the State.

There are 211 Communities or villages in the State that have a population of 25 or more Natives.

Thirty-five Native townsites established and patented to a trustee with both restricted and non-restricted deeds issued.

The Bureau of Land Management is preparing surveys and townsite plats for 67 Native townsites, currently 31 of these surveys have been completed and the plats approved, being ready for patent to a trustee.

The Bureau operates 53 day schools in the State with jurisdiction of Bureau schools being transferred to the State of Alaska as rapidly as the State can accept these operations in their system.

SACRAMENTO AREA (Cont.)	Tribal	Individually Owned	Govt-Owned	Total
CALIFORNIA (Cont.)				
CALIFORNIA AGENCY (Cont.)				
Sherwood Valley Rancheria	292.22	—	—	292.22
Shingle Springs Rancheria	160.00	—	—	160.00
Stewarts Point Rancheria	40.00	—	—	40.00
Sulphur Bank Rancheria	50.00	—	—	50.00
Susanville Reservation	30.00	—	—	30.00
Tule River Reservation	54,116.00	—	—	54,116.00
Tuolumne Rancheria	323.10	—	—	323.10
X. L. Ranch Reservation	9,254.86	—	—	9,254.86
Yokayo Rancho	—	—	.50	.50
HOOPA AREA FIELD OFFICE				
Big Bend Rancheria	40.00	—	—	40.00
Big Lagoon Rancheria	5.50	—	—	5.50
Hoopa Valley Reservation	84,744.16	1,328.88	—	86,073.04
Hoopa Valley Reservation Extension	3,421.00	3,417.11	—	6,838.11
Montgomery Creek Rancheria	72.00	—	—	72.00

Public Domain Allotments	408.37	6,073.20	—	6,481.57
Resighini Reservation (Coast Indian Community)	228.00	—	—	228.00
Roaring Creek Rancheria	80.00	—	—	80.00
Trinidad Rancheria	54.60	—	—	54.60
PALM SPRINGS OFFICE				
Agua Caliente (Palm Springs)	2,055.83	23,843.01	—	25,898.84
RIVERSIDE AREA FIELD OFFICE				
Augustine Rancheria	341.80	160.49	—	502.29
Barona Rancheria	5,005.00	—	—	5,005.00
Cabazon Reservation	1,153.21	548.32	—	1,701.53
Cahuilla Reservation	18,272.38	—	—	18,272.38
Campo Reservation	15,010.00	—	—	15,010.00

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE,

Petitioner,

v.

JESSIE SHORT, ET AL., and THE UNITED STATES,

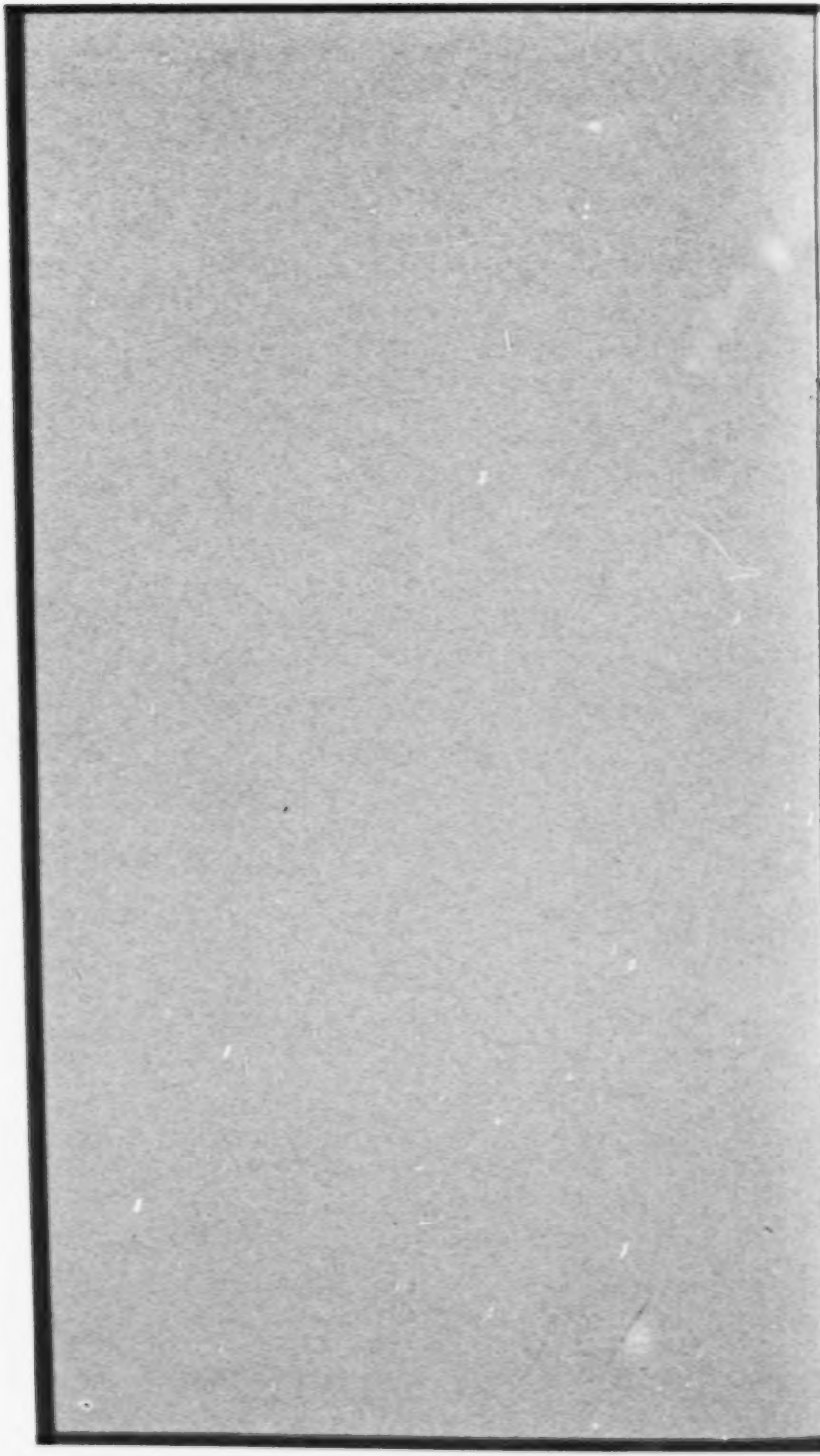
Respondents.

MOTION OF SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER INDIAN RESERVATION, ARIZONA, FOR LEAVE TO FILE STATEMENT AMICUS IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDANS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND STATEMENT OF SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PHILIP J. SHEA
RICHARD B. WILKS
Of Counsel

January, 1974



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MOTION OF SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER INDIAN RESERVATION, ARIZONA, FOR LEAVE TO FILE STATEMENT AMICUS IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDANS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Salt River Pima-Maricopa Indian Community of the Salt River Indian Reservation, Arizona, respectfully moves for leave to file, as *amicus,* the accompanying statement in support of the petition of the Hoopa Valley Tribe for a writ of certiorari to the United States Court of Claims for review of *Short* v. *United States,* No. 102-63 (Oct. 17, 1973).

In support of this motion, your *amicus* states that the decision below may divest the members of the Salt River Pima-Maricopa Indian Community of exclusive right, title and interest in the property and resources of the Salt River Indian Reservation, by

precipitating a flood of unjust and ill-founded claims upon the property of that reservation by neighboring, off-reservation, or other landless Indians; and that the assumption of power by the Court of Claims to determine membership or enrollment in a tribal entity for purposes of distributing the assets of a reservation is contrary to established law and detrimental to the best interest of the entire American Indian community.

For purposes of resolving these issues which profoundly affect this government's administration of Indian affairs, and in the interests of justice, *amicus* urges this Court to grant this motion and the petition of the Hoopa Valley Tribe of Indians for a writ of certiorari.

Respectfully submitted,

ROYAL D. MARKS

Counsel for Salt River Pima-
Maricopa Indian Community, Amicus.

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MARKS & MARKS
PHILIP J. SHEA
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Of Counsel

January, 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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Respondents.

STATEMENT OF SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

I. STATEMENT OF INTEREST

Your *amicus*, the Salt River Pima-Maricopa Indian Community of the Salt River Indian Reservation, Arizona, is organized as a self-governing Indian tribe, recognized by the Secretary of the Interior.

The Salt River Indian Reservation is a large triangular tract of land, approximately 46,626 acres, located contiguously to the Phoenix urban area in the northeastern quadrant of Maricopa County, Arizona. The reservation was set aside, by Executive Order of June 14, 1879 (1 Kappler 806-07), amended by Executive Order of October 23, 1911 (3 Kappler 668), for the use

of the Pima and Maricopa Indians, "and such other Indians as the Secretary of the Interior may see fit to settle thereon . . . ." Additional lands were added to the reservation by Executive Order of October 20, 1910 (3 Kappler 670-71), and Executive Order of September 28, 1911 (3 Kappler 671). By Executive Order of March 22, 1911 (3 Kappler 671), the original Order creating the Salt River Indian Reservation was amended so as to make available the lands of said reservation for "such other Indians as the Secretary of the Interior may see fit to settle thereon," in addition to the "Pima and Maricopa Indians."

The people of the Salt River Indian Reservation are predominantly of Pima-Maricopa extraction and number approximately 1,800 persons. Through the Tribe's official governing body, the Salt River Pima-Maricopa Indian Community Tribal Council, and with the help of all resident Indians, the Salt River Pima-Maricopa Indians have lived a tranquil and productive life. However, that existence is now seriously threatened by the decision of the United States Court of Claims in *Short* v. *United States,* No. 102-63 (Oct. 17, 1973). That is to say, the decision in *Short* may encourage neighboring and other off-reservation Indians to pursue unjust and ill-founded claims for a proportionate share of the property and resources of the Salt River Indian Reservation, just as the Yurok Indians, in *Short,* are on the verge of successfully appropriating a majority share of the ancestral homelands of the Hoopa Indians. Hence, the *amicus,* Salt River Pima-Maricopa Indians support the Hoopa Indians in urging this Court to issue a writ of certiorari for review of the Court of Claims decision in *Short.*

II. THE DECISION OF THE COURT BELOW THREATENS THE PROPERTY RIGHTS OF NUMEROUS INDIAN TRIBES WHICH RESIDE ON EXECUTIVE ORDER RESERVATIONS.

The decision of the Court of Claims threatens to cloud title to all Indian reservations which, like the Hoopa Valley Reservation,

were established pursuant to Congressional or Executive enactments which did not clearly define the Indian tribes or individuals who were entitled to share in the resources of the named reservation. As stated previously, the Salt River Indian Reservation was created for the Pima and Maricopa Indians and such other Indians which the Secretary saw fit to settle thereon. Executive Order of October 23, 1911 (3 Kappler 668); Executive Order of March 22, 1911 (3 Kappler 671). *See also,* Northern Cheyenne Reserve, Montana, Executive Order of November 26, 1884 (1 Kappler 860), as amended by Executive Order of March 19, 1900 (1 Kappler 860-61); Fort Stanton Reserve, New Mexico, Executive Order of March 24, 1883 (1 Kappler 872-73); Mukleshoot Reserve, Washington, Executive Order of January 20, 1857 (1 Kappler 920), Executive Order of April 9, 1874 (1 Kappler 918-19). The precedent established in *Short* may initiate a destructive "land rush," comparable only to that which opened this country's western frontier more than a century age to white settlement. For it is reasonable to assume that the decision in *Short* will precipitate numerous claims upon the lands of existing reservations, in the same manner that the Yurok Indians advanced claims upon the resources of the Hoopa Indians' reservation. Indeed, the damage to an Indian whose aboriginal home is being unjustly exploited is equally devastating when the exploiter is a third or fourth generation off-reservation Indian, whose ties to the reservation are illusory, as when the interloper is non-Indian. Your *amicus* submits that in a case where an organized Indian tribe may lose the reservation which comprises its aboriginal homelands, as the result of an order of a lower court, the issue is abundantly appropriate for Supreme Court review.

III. THE DECISION OF THE COURT BELOW THREATENS TO DEPRIVE INDIAN TRIBES OF THE IMPORTANT FUNCTION OF DETERMINING TRIBAL ENROLLMENT ON AN INDIAN RESERVATION

Based upon the judicially recognized concept of tribal sovereignty, a desire to encourage self-determination and self-identity among American Indians, and a reverence for Indian culture and tradition, it has been previously held that the power to determine membership in a tribal entity, for purposes of tribal asset distribution, lies with the Indian tribe itself, with the approval of the Secretary of the Interior, or with the Congress. *Stephens* v. *Cherokee Nation,* 174 U.S. 445 (1899). *See Cherokee Nation* v. *Hitchcock,* 187 U.S. 294 (1902). Despite the Hoopa Tribe's extensive efforts at self-government, including the organization of a functional tribal government and the compilation of a tribal roll, which efforts were specifically approved by the Secretary of the Interior, the Court of Claims has installed itself as the sole arbiter of tribal membership qualifications, and has subjected the entire question of tribal enrollment on the Hoopa Valley Reservation to judicial experimentation. Such efforts encroach upon the sovereignty of the tribe, upon the preeminence of Congress, and upon the plenary discretion of the Executive, with respect to the conduct of Indian affairs.

CONCLUSION

Your *amicus* submits that the decision of the Court of Claims, in *Short* v. *United States,* No. 102-63 (Oct. 17, 1973), may seriously endanger the continued existence of a reservation system of Indian occupancy in the United States, and may irreparably erode the conception and practice of Indian tribal sovereignty. For these reasons, the important issues considered in *Short* should be finally resolved by the Supreme Court of the United States.

Respectfully submitted,

ROYAL D. MARKS

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Maricopa Indian Community, Amicus.

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PHILIP J. SHEA
RICHARD B. WILKS
Of Counsel

January, 1974

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OCTOBER TERM, 1973

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

BRIEF OF AMICUS CURIAE, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION, IN SUPPORT OF HOOPA VALLEY TRIBE OF INDIANS

EDWARD C. BOU
Counsel for Amicus Curiae
1700 K Street, N.W.
Washington, D. C. 20006

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MOTION OF NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the National Tribal Chairmen's Association (the "Association") and respectfully moves for leave to file a brief *amicus curiae* in support of the Hoopa Valley Tribe of Indians.

The Association states, in support of this motion, that the decision of the court below threatens to terminate the reservation rights of many federally-recognized In-

dian tribes and is contrary to the best interests of all American Indians.

Respectfully submitted,

EDWARD C. BOU
Counsel for Amicus Curiae
1700 K Street, N.W.
Washington, D. C. 20006

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BRIEF OF AMICUS CURIAE, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION, IN SUPPORT OF HOOPA VALLEY TRIBE OF INDIANS

STATEMENT OF INTEREST

The National Tribal Chairmen's Association, of 1701 Pennsylvania Avenue, Washington, D.C., represents more than 150 elected or appointed chairmen of Indian reservations and federally recognized Indian tribes in the United States of America. The goals of the Association are to maintain Indian treaty or executive order rights, to preserve Indian culture and tradition, and to promote

social, educational, economic and political progress among our Indian people.

The Association strongly believes that the decision of the trial judge in *Short* v. *United States*, No. 102-63 (October 17, 1973), adopted per curiam by the Court of Claims without explanation, will cause unrest throughout the Indian community, and may seriously retard the continued economic, social and political growth of many tribes represented herein. It is the duty of the Association to protect the vital interests of the many Indian reservations and federally recognized Indian tribes in the United States by strongly protesting the decision of the court below, and by respectfully urging this Court to grant the petition of the Hoopa Valley Tribe for a writ of certiorari in order ultimately to reverse said decision.

I. THE DECISION OF THE UNITED STATES COURT OF CLAIMS DIVESTS THE HOOPA INDIANS OF RIGHTS AND INTERESTS WHICH ARE BASED UPON THEIR ABORIGINAL OCCUPANCY OF THE HOOPA VALLEY RESERVATION

The right of the Hoopa Indians to the property and resources of the 12-mile Square portion of the Hoopa Valley Reservation, based upon aboriginal occupancy, is well known within the Indian community. Equally clear has been the United States government's implicit, if not explicit, recognition and approval of those rights.[1] Nev-

[1] For more than a century (*i.e.*, from at least the "Treaty of peace and friendship between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians" (August, 1864) through the government's defense of Hoopa interests in the instant litigation), the United States Government has protected the Hoopa Indians, and other residents of the Square, in the peaceful and exclusive habitation of the Square and use of its resources. So, too, has the Government protected the exclusive interests of the Yurok Indians, and other non-Yurok residents, in the Hoopa Ex-

ertheless, the decision of the Court of Claims, if affirmed, will effectively wrest control of the reservation from the Hoopa Indians, in favor of a neighboring Indian tribe whose claim to Hoopa property on the Square is tenuous at best. Such deprivation, without just cause, violates a basic tenet of Indian tribal sovereignty, *i.e.*, that original Indian title, which has been transmuted to Executive Order title,[2] is good against all parties (including other Indians), save the federal government.[3] Consequently this decision threatens to diminish the secured nature of Indian property rights by subjecting those rights to untimely and arbitrary divestment.

II. THE COURT OF CLAIMS HAS ERRONEOUSLY ASSUMED THE RESPONSIBILITY OF ESTABLISHING QUALIFICATIONS FOR ENROLLMENT IN THE TRIBAL ENTITY WHICH IS ENTITLED TO SHARE IN THE PROPERTY AND RESOURCES OF THE HOOPA VALLEY RESERVATION

The concepts of Indian self-determination and tribal sovereignty are seriously threatened where the judicial branch of the federal government wrongly assumes the responsibility of determining the membership or enrollment requirements of a tribal entity which is to share in the economic and social resources of an Indian reservation. The opinion of the trial judge, as adopted by the Court of Claims, seems directly contrary to the well established rule that competency for defining tribal enroll-

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tension Reservation and its resources. The history of legislative and executive action in this regard reveals that said policy was based primarily upon the Hoopa's aboriginal occupancy of the Square, the Yurok's aboriginal occupancy of the Extension, and the resolve of the two tribes to risk extinction rather than relinquish their aboriginal homelands.

[2] *Cf. Cabazon Band of Mission Indians* v. *United States*, 21 Ind. Cl. Comm. 119 (1969).

[3] *Spalding* v. *Chandler*, 160 U.S. 394 (1896).

ment for purpose of resolving entitlement to tribal property lies with Congress, or more properly, with the Indian tribe.[4] In accordance with this principle, and well prior to this litigation, the determination of entitlement had been made initially by the tribe, with the encouragement and approval of the Secretary of the Interior, and later confirmed by the Deputy Solicitor in 1958.[5] By rejecting these actions, the Court of Claims has encroached upon the sovereignty of the Indian tribe, challenged the competency of the Congress, and substituted its views for those of the author of the instrument being construed.

The Association urges this Court to reaffirm the principle that the establishment of standards or guidelines for determining membership in a tribal entity, for purposes of economic distribution and social control, is a political and administrative question, within the province of the Indian tribe and legislative branch, and is not a proper subject for judicial experimentation.

CONCLUSION

The Court of Claims decision in the instant suit has profound implications for the entire American Indian community, insofar as it arbitrarily projects one Indian group into a superior and favored position over a neighboring Indian group. Although this matter is complex and fraught with controversy, it is our judgment that abstention by the Supreme Court will only work to sharpen the conflict. For we must not forget that it was the judicial branch of the federal government, through the Court of Claims, which precipitated this confronta-

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[4] *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899); *Martinez* v. *Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957).

[5] Rights of Indians in the Hoopa Valley Reservation, California, 65 I.D. 59 (1958).

tion 110 years after the fact. Thus, it would seem incumbent upon the highest court in the land to make absolutely certain that any such judicial encroachment upon the lives of American Indians is at least just and correct. A further deterioration of trust between the government and the Indian community, coming as the result of an inequitable and ill conceived decision of a lower court would be most tragic. For these reasons, the Association submits that this matter is one of significant and overriding national importance and is therefore appropriate for Supreme Court review.

The National Tribal Chairmen's Association, as *amicus curiae*, respectfully requests that the petition for a writ of certiorari filed by petitioners, the Hoopa Valley Indians, be granted.

Respectfully submitted,

EDWARD C. BOU
Counsel for Amicus Curiae
1700 K Street, N.W.
Washington, D. C. 20006

CERTIFICATE OF SERVICE

A motion for leave to file a brief *amicus curiae* and a brief *amicus curiae* in support of the Hoopa Valley Tribe of Indians was served this 7 day of February, 1974, by delivering three copies to Jerry C. Straus, Esquire, c/o Wilkinson, Cragun & Barker, 1735 New York Avenue, N.W., Washington, D.C. 20006, counsel for petitioner Hoopa Valley Tribe, and by mailing three copies, first class postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, counsel for respondent United States, and air mail postage prepaid, to Harold C. Faulkner, Esquire, and William C. Wunsch, Esquire, c/o Faulkner, McComish & Wunsch, 351 California Street, San Francisco, California 94104, counsel for respondents Jessie Short, et al.

EDWARD C. BOU
Counsel for Amicus Curiae
1700 K Street, N.W.
Washington, D. C. 20006

SUPREME COURT, U. S

IN THE

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MOTION OF NATIONAL CONGRESS OF AMERICAN INDIANS FOR LEAVE TO FILE BRIEF AMICUS IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

AND

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ALBERT J. AHERN, JR.
5205 Leesburg Pike
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Attorney for Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE,
Petitioner,

v.

JESSIE SHORT, ET AL., and THE UNITED STATES,
Respondents.

MOTION OF NATIONAL CONGRESS OF AMERICAN INDIANS FOR LEAVE TO FILE BRIEF AMICUS IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The National Congress of American Indians, Inc. (NCAI), Washington, D. C., respectfully moves for leave to file the attached brief, as *amicus curiae*, in support of the petition of the Hoopa Valley Tribe of Indians for a writ of certiorari in the above entitled cause.

The decision of the United States Court of Claims in *Short* v. *United States*, No. 102-63 (Oct. 17, 1973) threatens to impair the right of self-government of mem-

ber tribes of NCAI. For this reason, your *amicus* respectfully requests this Court to grant this motion.

Respectfully submitted,

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Baileys Crossroads, Va. 22041

Attorney for Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE,
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JESSIE SHORT, ET AL., and THE UNITED STATES,
Respondents.

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The National Congress of American Indians, Inc. (NCAI), is a nonprofit association of 90 Indian tribes. Its purpose is to promote the interests of American Indians. It was incorporated in Oklahoma in 1954, and its national headquarters is at 1346 Connecticut Avenue, N.W., Washington, D.C.

The Indian tribes of this country still retain and more than ever cherish their natural right of self-government,

though this right is subject to the plenary power of Congress to limit or terminate. When the right of self-government of an important and historic tribe—one that has been in a state of peace and friendship with the United States since the Executive Treaty of 1864—is abrogated not by the Legislative Branch but by the Judicial Branch, *every* tribe fears that its precious right of self-government will be subject to the varying opinions of the various courts.

A judicial decision terminating a tribe's right of self-government is so alarming to the Indian tribes of this country, especially when handed down in a mere suit for damages against the United States, and especially when the decision is affirmed by the Court of Claims without even an opinion, that this Court should not allow it to enter the history books without more. The importance of such a decision to the very existence of the Indian tribes of this country urgently commends that it be made by this Court.

Respectfully submitted,

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Baileys Crossroads, Va. 22041

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

Motion for leave to file and brief *amicus curiae* served this 7th day of February, 1974, by delivering three copies to Jerry C. Straus, Esq., c/o Wilkinson, Cragun & Barker, 1735 New York Avenue, N.W., Washington, D.C. 20006, attorney for petitioner Hoopa Valley Tribe, and by mailing three copies first class, postage pre-paid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, attorney for respondent United States, and air mail, postage pre-paid, to Harold C. Faulkner, Esq., and William C. Wunsch, Esq., c/o Faulkner, McComish & Wunsch, 351 California Street, San Francisco, California 94104, attorneys for respondents Jessie Short, et al.

ALBERT J. AHERN, JR.
5205 Leesburg Pike
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Attorney for Amicus Curiae

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE, *Petitioner,*

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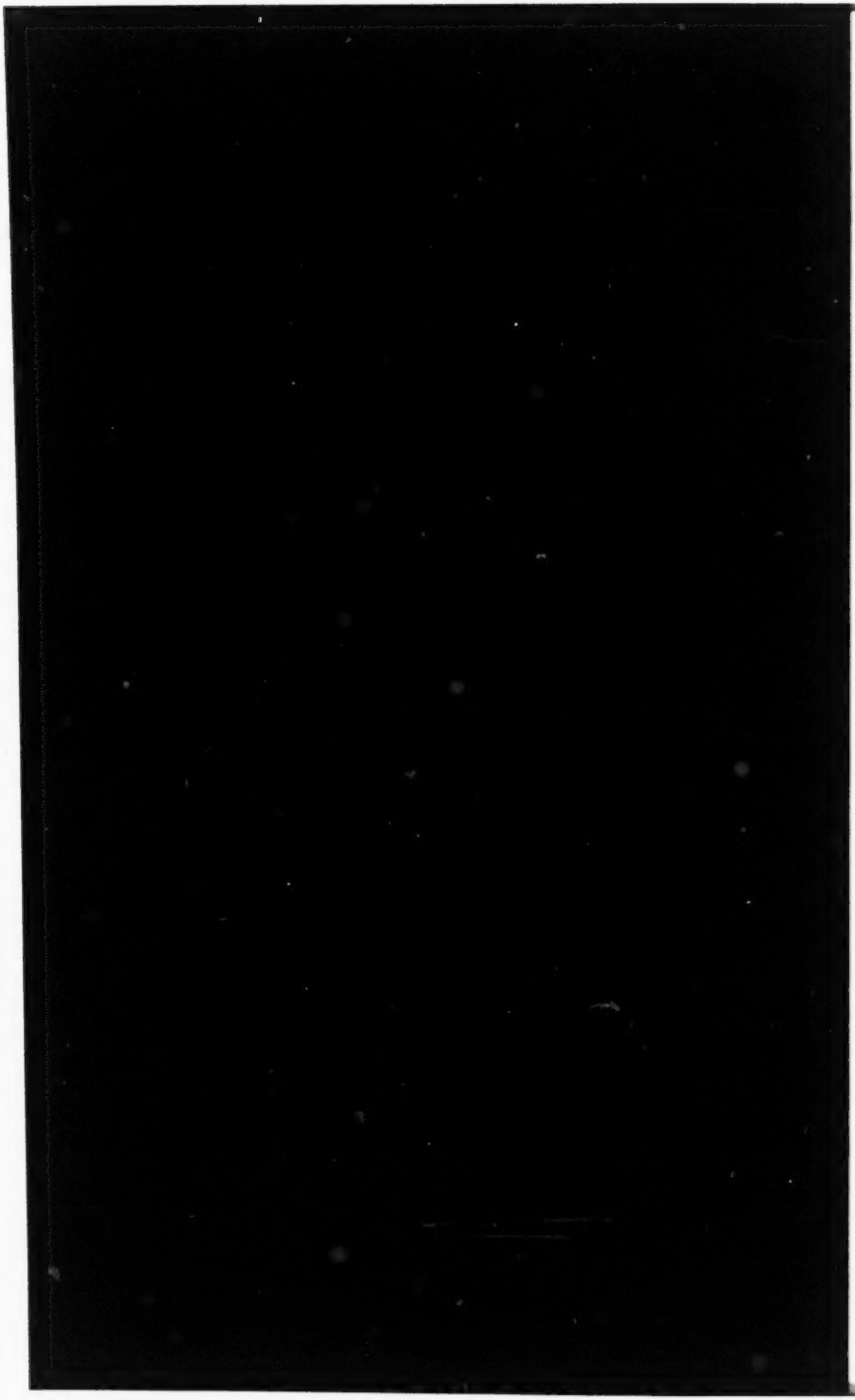
On Petition for Writ of Certiorari to the United States Court of Claims

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MOTION FOR LEAVE TO FILE BRIEFS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE, *Petitioner*,

v.

JESSIE SHORT, *et al.*, AND THE UNITED STATES, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Claims

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MOTION FOR LEAVE TO FILE BRIEFS AMICUS CURIAE

The Colorado River Indian Tribes (hereinafter the "Tribes") respectfully move for leave to file the attached brief amicus curiae in support of the petition for writ of certiorari to the United States Court of Claims in this case, and for leave to file a brief amicus curiae upon the merits if the petition for writ of certiorari is granted.

Counsel for petitioner has requested that the Tribes file briefs amicus curiae. The consents of the respondents to the filing of briefs have not been sought due to the shortness of time available, hence this motion is filed.

The Tribes are Indians organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 U.S.C. Sections 461-470), specifically Section 16 thereof (25 U.S.C., Section 476). They occupy the Colorado River Reservation, an Indian reservation established pursuant to Acts of Congress and Executive Orders, and they have the beneficial owernship of real property interests in that Reservation. Act of Congress of April 30, 1964, P.L. 88-302 (78 Stat. 188). Their Reservation is adjacent to the Colorado River, lying principally in Arizona but partially in California. It initially was created pursuant to Act of Congress of March 3, 1865 (13 Stat. 559) " . . . for the Indians of said river and its tributaries." Most of the present members of the Tribes trace their ancestry to different aboriginal tribes which historically lived along or near the Colorado River, rather than to a single tribe. These factors appear to be similar to some of the circumstances pertinent to the Hoopas and Yuroks and which are the subject of the litigation.

The interest of the Tribes, which undoubtedly is shared by many other reservation Indians, is in obtaining from this Court a clarification of the rights of organized Indian Tribes, and their members residing upon reservations, both

as to determination and qualification of tribal membership and as to participation in the benefits and proceeds of their reservation. There are aspects of the findings and opinions of the trial judge, as adopted by the Court of Claims, which place these matters in doubt, and which may be contrary to established law concerning the rights of Indians. Furthermore, the decision below seems particularly susceptible to incorrect application in other situations to deprive organized Indian tribes and their members of their tribal integrity and autonomy, and their opportunity to realize political and economic self-sufficiency, contrary to law and national policy. The Tribes urge this Court to grant the petition so that these matters of great importance to American Indians may receive a full, authoritative consideration and resolution.

Although it is expected that the parties to the instant litigation will adequately present the specific facts or questions of law which are necessary for the resolution of this particular case, its ramifications, and interpretations both correctly and erroneously made, can have grave consequences for other tribes throughout the United States. The Tribes believe that these broader aspects may not be adequately presented or defined

and distinguished by the parties and that the contribution of amicus curiae may be beneficial.

Respectfully submitted,

FREDERIC L. KIRGIS
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Of Counsel:

TERRY NOBLE FISKE
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WALKER AND GROVER
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Dated: February 7, 1974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE, *Petitioner*,

v.

JESSIE SHORT, *et al.*, AND
UNITED STATES, *Respondents*.

On Petition for Writ of Certiorari
to the United States Court of Claims

BRIEF OF AMICUS CURIAE, COLORADO RIVER INDIAN TRIBES

The interest of the Tribes in clarification and resolution of questions and issues raised by the decision of the Court of Claims, by its adoption of the findings and opinion of the trial judge, is set forth in the preceding motion. Although the Tribes have no involvement in the specific controversy between the Hoopa Valley Tribe and the Yuroks, and the United States, there are matters of

law in the case which may have application, or be misapplied, to the Tribes and to other Indian tribes. They need to be clarified, and unique factual and legal aspects which may be determinative of the instant case need to be identified as such and expressly limited to this case.

It is now recognized that American Indians have never constituted a single culture or society, but rather they belong to or have descended from numerous, unrelated tribes. The tribes have distinct traditions, relationships and ways of life. Strong identification with and allegiance to his tribe is a characteristic of the American Indian.

Indian reservations were established by the United States by various means, but invariably for particular or identifiable tribes, as contrasted to creation of them for Indians generally. A tribe and its reservation, historically and as a matter of public policy and law, must be considered together -- the reservation being the land base of the tribe. To fulfill the purpose of the creation of a reservation, the benefits and proceeds of it should inure to the tribe and its members who are dependent upon it for maintenance of their tribe as a viable political, economic, and cultural entity.

It is the national law and policy to encourage and assist Indians to preserve their unique cultures and to fully realize self-sufficiency and self-determination through their tribal organizations. See e.g., Title 25 U.S.C. Sections 476, 467, and 461; President's Indian Message to the Congress, July 8, 1970. If, as a general matter of law, individuals, even though of Indian blood, who are not members of the only tribal organization on a reservation, and who may be non-residents of the reservation, and who do not participate in the culture or organization of the tribe, nevertheless are permitted to draw heavily from the assets of the reservation, then that tribe may be incapable of functional survival except by governmental gratuities.

The question of jurisdiction and responsibility for determining tribal membership, particularly for purposes of distribution of tribal assets, which is the subject of the third reason set forth in the brief of petitioner for granting the writ of certiorari, needs to be considered by this Court because of the possible impact of the decision below upon Indians elsewhere. Entitlement to participate in the financial benefits of tribal membership, which benefits have been so long delayed in American history, is a matter of crucial moment to American Indians. To avoid a potential generalized basis for a new form of unjust en-

richment and distribution to counterparts of "laughing heirs" of other tribes, the Court is requested to grant the writ so that this matter may be considered.

Respectfully submitted,

FREDERIC L. KIRGIS
Counsel for Amicus Curiae
1900 Security Life Building
Denver, Colorado 80202

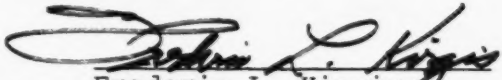
Of Counsel:

TERRY NOBLE FISKE
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1900 Security Life Building
Denver, Colorado 80202

Dated: February 7, 1974

CERTIFICATE OF SERVICE

This is to certify that I have this date served the attached Motion for Leave to File Briefs Amicus Curiae and Brief of Amicus Curiae on the Hoopa Valley Tribe, Jessie Short, and the United States, by mailing three copies of the same, air-mail, postage prepaid, to each of their respective counsel of record, Jerry C. Straus, Esq., Wilkinson, Cragun & Barker, 1735 New York Avenue, N.W., Washington, D. C., 20006; Harold C. Faulkner and William C. Wunsch, Faulkner, McComish & Wunsch, 351 California Street, San Francisco, California, 94104; and the Solicitor General, Department of Justice, Washington, D. C., 20530. All parties required to be served have thus been served.



Frederic L. Kirgis
1900 Security Life Bldg.
Denver, Colorado 80202
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February 7, 1974

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1104

THE HOOPA VALLEY TRIBE,
Petitioners,
v.
JESSIE SHORT, *et al.*, and THE UNITED STATES,
Respondents.

MOTION OF THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, WASHINGTON, FOR LEAVE TO FILE STATEMENT AMICI CURIAE IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

AND

STATEMENT OF THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, WASHINGTON, IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ZIONTZ, PIRTLE, MORISSET & ERNSTOFF
By ROBERT L. PIRTLE
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February 6, 1974

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

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IN THE

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MOTION OF THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, WASHINGTON, FOR LEAVE TO FILE STATEMENT AMICI CURIAE IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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STATEMENT OF THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, WASHINGTON, IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MOTION OF THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, WASHINGTON, FOR LEAVE TO FILE STATEMENT AMICI IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Colville Confederated Tribes of the Colville Indian Reservation, Washington, respectfully move for leave to file, as *amici curiae* the accompanying statement in support

of the petition of the Hoopa Valley Tribe of Indians (No. 73-1104, filed January 14, 1974) for a writ of certiorari to the United States Court of Claims.

The Colville Tribes state, in support of this motion, that the holding of the Court of Claims in *Short v. United States*, No. 102-63 (Oct. 17, 1973) is erroneous, with respect to the question of tribal enrollment for purposes of allocating proportionate shares of the resources of the Hoopa Valley Reservation; and that the holding is potentially damaging to all organized, federally-recognized tribal entities and, in particular, to the Colville Confederated Tribes of the Colville Indian Reservation.

In the interest of justice, the Colville Confederated Tribes respectfully request that the Court grant this motion.

STATEMENT OF THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, WASHINGTON, IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

I.

STATEMENT OF INTEREST

The Colville Confederated Tribes of the Colville Indian Reservation, Washington, comprise eleven bands of Indians under a Constitution and Bylaws approved by the Secretary of the Interior on February 26, 1938. Section 2 of Amendment III of the tribal Constitution empowers the Business Council of the Confederated Tribes "to prescribe rules and regulations governing future membership in the tribes, including the adoption of members and loss of membership. . . .", subject to the approval of the Secretary of the Interior.

The power of the tribes to determine enrollment upon the Colville Reservation, with the approval of the Secretary, has been challenged in two cases recently decided by the United States Court of Appeals for the Ninth Circuit. *Thompson v. Tonasket,* No. 72-1193 (9th Cir., Nov. 2, 1973); *Laramie v. Nicholson,* No. 72-1264 (9th Cir., Oct. 9, 1973). Your *amici* intend to petition this Court for writs of certiorari to review the two aforementioned Ninth Circuit decisions.[1]

The decision of the Court of Claims in *Short v. United States,* No. 102-63 (Oct. 17, 1973) bears directly upon the resolution of questions of tribal membership which are presented in *Thompson* and *Laramie.*

II.

THE COURT OF CLAIMS HAS NO SUBJECT MATTER JURISDICTION OVER INDIAN TRIBAL MEMBERSHIP QUESTIONS

The sovereign immunity of an Indian tribe extends to questions of membership or enrollment on an Indian reservation, *Martinez v. Southern Ute Tribe,* 249 F.2d 915, 920 (10th Cir. 1957), especially where individual entitlement to tribal property or resources must be determined. *Stephens v. Cherokee Nation,* 174 U.S. 445 (1899).

The regulation of tribal affairs has been deemed political and administrative in nature, subject to the plenary authority of the legislative branch. *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 308 (1902). Thus, jurisdiction in the federal courts, including the Court of Claims, to

1. On December 11, 1973, Mr. Justice Douglas granted an extension of time to February 20, 1974, in which to file a petition for writs of certiorari in these cases.

entertain membership questions regarding Indian tribes must be expressly conferred by Congress. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

Congress has not expressly conferred upon the Court of Claims any jurisdiction over tribal enrollment on Indian reservations in general, or on the Hoopa Valley Reservation, California, in particular.

III.

CONCLUSION

The question whether the Court of Claims may enroll Yurok Indians on the Square portion of the Hoopa Valley Reservation over the objections of the Hoopa Valley Tribe of Indians and the Executive branch of government, in violation of the Hoopa Tribe's federally-recognized and approved Constitution and By-Laws, and in conflict with an established body of judicial precedent, is one of great importance for intertribal and intratribal relations, and is therefore appropriate for Supreme Court Review.

The Colville Confederated Tribes of the Colville Reservation respectfully request that the petition of the Hoopa Valley Tribe of Indians for a writ of certiorari to the United States Court of Claims be granted, and that the Court of Claims decision in *Short v. United States*, No. 102-63 (Oct. 17, 1973) be reversed.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET
& ERNSTOFF

By ROBERT L. PIRTLE
Amici Curiae and
Attorneys for the Colville
Confederated Tribes in
Support of Petitioner

February 6, 1974

FEB 14 1974

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE, *Petitioner,*

vs.

JESSIE SHORT, et al., and THE UNITED STATES,
Respondents.

BRIEF OF RESPONDENTS JESSIE SHORT ET AL. IN OPPOSITION TO PETITION OF THE HOOPA VALLEY TRIBE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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WILLIAM C. WUNSCH,
FAULKNER, MCCOMISH & WUNSCH,
Of Counsel.

February, 1974

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In the Supreme Court
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THE HOOPA VALLEY TRIBE, *Petitioner,*

vs.

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BRIEF OF RESPONDENTS JESSIE SHORT ET AL. IN OPPOSITION TO PETITION OF THE HOOPA VALLEY TRIBE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Respondents Jessie Short, et al., the Plaintiffs in the United States Court of Claims, present this brief in opposition to the Petition of the Hoopa Valley Tribe for a Writ of Certiorari to the United States Court of Claims.

JURISDICTION

The Petitioner, the Hoopa Valley Tribe, invokes the jurisdiction of this Court under 28 U.S.C. §1255(1).

Section 1255 of the United States Code provides in full as follows:

> "Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted on petition of the United States or the claimant.
>
> (2) By certification of any question of law by the Court of Claims in any case as to which instructions are desired and upon such certification the Supreme Court may give binding instructions on such question."

At the time that the United States Court of Claims rendered its decision in favor of respondents Jessie Short, et al., the plaintiffs and claimants in this case, it granted a motion by the Hoopa Valley Tribe to intervene as a party. However, the statutory grant of jurisdiction in 28 U.S.C. 1255(1) does not authorize a review by this Court of a case in the Court of Claims upon petition of any party except the United States or the claimant. The respondent claimants therefore enter their objection to the jurisdiction of this Court to grant a writ of certiorari upon the petition of the Hoopa Valley Tribe.

QUESTION PRESENTED

The statement of the questions presented in the petition for certiorari of the Hoopa Valley Tribe are so grossly misrepresented that they must be restated by respondents Jessie Short, et al.

Basically there is only a single question presented by the decision of the Court of Claims and that is whether or not the Hoopa Valley Indian Reservation in California, created and later enlarged by Executive Orders validly issued pursuant to the Act of Congress of April 8, 1864, 13 Stat. 39, providing for the establishment of not more than four reservations to accommodate all of the Indians of California, constitutes a single reservation held in trust by the United States for the equal benefit of all California Indians accommodated on such reservation and their descendants.

The decision of the Court of Claims does not as asserted by petitioner present the question:

> "Whether the Hoopa Valley Tribe must surrender to a large group of Yurok Indians a controlling political and economic interest in the Hoopa Reservation (which was established in Hoopa aboriginal territory pursuant to an 1864 'Executive Treaty') merely because the Yuroks' own reservation was technically attached to the Hoopas' reservation by an 1891 Executive Order."

This is so because the Hoopa Valley Reservation as found by the Court of Claims was not established in Hoopa aboriginal territory as the "Hoopa Reservation" by any treaty, but was established by an Executive Order issued on June 23, 1876 in an area which included aboriginal territory of both Hoopas and Yuroks pursuant to the Act of April 8, 1864, 13 Stat. 39, for the benefit of all California Indians who might settle there. (Findings 179-181, Petitioner's Appendix, page 100). As determined by this Court in its decision in *Donnelly v. United States,* 228 U.S. 243 (1913) this

reservation was thereafter validly enlarged by the Executive Order of October 16, 1891 pursuant to the continuing authority of the President under the Act of April 8, 1864. The land added to the Hoopa Valley Reservation by this Executive Order had not, as incorrectly asserted by petitioner, theretofore constituted "the Yuroks' own reservation."

Neither as claimed by petitioner is there presented the question:

> "Whether it is tenable for the Court of Claims to say in one breath that the Hoopa Valley Reservation was created under such circumstances that no tribe could have vested rights in it, and in the next breath to say that the Yuroks are entitled to recover money damages from the United States for infringement of the same nonvested rights."

The Court of Claims did not say that the Hoopa Valley Reservation was created under such circumstances that the Indians accommodated there did not acquire vested rights of any sort. The Court merely ruled, in accordance with this Court's decision in *Donnelly v. United States*, 228 U.S. 243 (1913) that the rights to the benefits of the Hoopa Valley Reservation acquired by the Indians accommodated there were not vested against possible modification by the President in the exercise of his continuing authority under the Act of April 8, 1864 to alter the Reservation boundaries and accommodate additional Indians there. The Court of Claims recognized that all Indians accommodated on the Hoopa Valley Reservation acquired vested rights to share equally in its benefits

which could not be infringed in any way except by Presidential action specifically taken pursuant to the Act of April 8, 1864 to further the Congressional purpose. After the Executive Order of 1891 enlarging the Hoopa Valley Reservation, no further action was taken by the President in respect to that Reservation under the authority conferred by the Act of April 8, 1864.

The decision of the Court of Claims does not as asserted by petitioner present the question:

> "Whether the Court of Claims has jurisdiction to determine that a group of Indians is entitled to enrollment on an Indian reservation when the Secretary of the Interior has ruled, in his plenary discretion, that it is not so entitled."

The Court of Claims determined that the Secretary of the Interior acted arbitrarily and contrary to law in recognizing only a select group of Indians as entitled to the revenues from the major portion of the unallotted trust-status lands of the Hoopa Valley Reservation to the exclusion of other Indians who, by reason of the statute and executive orders creating the reservation, were equally entitled to share in such revenues and many of whom had in fact been carried on the reservation rolls during the years such rolls were maintained. (Findings 188 and 189 and Findings 37-48, Petitioner's Appendix, pages 105 and 31-34). This determination of the Court of Claims constitutes a proper exercise of the judicial function of determining the rights conferred by the statute and executive orders creating the Reservation. This determination

does not present any question of judicial infringement upon any possible plenary administrative discretion to determine mere tribal enrollment.

STATUTES INVOLVED

In addition to the statutes cited by petitioner and set forth in the appendix to its petition, Section 4 of the Act of March 3, 1927 is also involved. This statute provides as follows:

> "Sec. 4. That hereafter changes in the boundaries of reservations created by Executive order, proclamation or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the Secretary of the Interior." (44 Stat. 1347; 25 U.S.C. 398d.)

STATEMENT OF THE CASE

Petitioner's statement of the case, including the Chronology on the initial page of its petition, presents such an inaccurate picture of the true nature of the case and the facts material to the consideration of the question presented that respondents Jessie Short, et al. are obliged to present the following statement. (References to petitioner's appendix are designated by "A.")

This case arose by reason of the unique method adopted by the Congress to provide adequate reservation accommodations for all of the Indians of Cali-

fornia and subsequent actions of officers of the executive branch thwarting the Congressional purpose.

Originally the Congress had sought to provide permanent reservation accommodations for the Indians of California, in a manner frequently employed elsewhere in the United States, by appointing Commissioners to negotiate for treaty reservations for particular tribes. Eighteen such treaties were negotiated with the California Indians and significantly one of them provided for a joint reservation for the Hoopa, Yurok, and Karok Tribes which would have encompassed much of the same area as ultimately became the Hoopa Valley Reservation. (Fdg. 18(e), A. 25). However, the Senate failed to ratify any of these treaties. See *Indians of California v. United States,* 98 Ct. Cl. 583 (1942).

The Congress thereupon made provision for permanent reservations for the Indians of California by enacting the Act of April 8, 1864, 13 Stat. 39, which authorized the President to establish not more than four reservations, as remote from white settlements as possible, adequate to accommodate all of the Indians of the State. (A. 113).

In August of that year Austin Wiley, the Superintendent of Indian Affairs for California, reported to the Commissioner of Indian Affairs that he had posted a public notice of the establishment, pursuant to the Act of April 8, 1864, of a reservation in Klamath County, California of such metes and bounds as might ultimately be approved by the President. He further advised the Commissioner that he was propos-

ing for such reservation the whole of the Hoopa Valley and to the summit of the mountains on each side about five miles. He also informed the Commissioner that in order to induce certain hostile Indians then gathered in the Hoopa Valley to lay down their arms he had negotiated a "treaty" with certain of the younger men provided that the Government would set aside this area as a reservation for the Hoopa, South Fork, Redwood, and Grouse Creek Indians and such other tribes as might thereafter avail themselves of its benefits. The Commissioner of Indian Affairs advised Wiley that the relations of the United States to the Indians of California did not contemplate treaties to be submitted to the Senate for confirmation, but that inasmuch as it was deemed advisable to have the chiefs and leading men of the tribes in question sign a document which would commit them, he was returning the agreement, with additions desired by the Secretary of the Interior, for signature and resubmission. There is no evidence that Wiley's "treaty" was ever signed by any Indians or that the desired additions were ever made known to any Indians or approved by them. Moreover, except for a notice posted by Wiley on February 8, 1865 stating the treaty stipulations were "confirmed", there is no indication that any further attention was ever paid to this document until it was dredged up by counsel for the Hoopa Valley Tribe at the trial of this case. (Fdgs. 12-17, A. 18-24).

On February 18, 1865, Superintendent Wiley issued a public notice defining the boundaries of the Hoopa Valley Reservation as follows: "Beginning at a point

where Trinity river flows into Hoopa valley and following down said stream, extending six miles on each side thereof, to its junction with Klamath river." The reservation as thus described consisted of a tract of land twelve miles square bisected by the lower twelve miles of the Trinity River. Since the Hoopa Valley proper is approximately six miles in length and after leaving the valley the Trinity River flows another six miles through a precipitous canyon to its junction with the Klamath River, the reservation as ultimately proposed by Superintendent Wiley and as eventually formally defined by Executive Order in 1876, was twice as large as originally proposed by Wiley in his "treaty" and in his report to the Commissioner of Indian Affairs in August, 1864. (Fdg. 21, A. 25-27).

The area of the Hoopa Valley Reservation as finally proposed by Wiley and confirmed by the President by Executive Order in 1876 comprised nearly 90,000 acres. (Fdg. 34, A. 31). Only a very small portion of this vast acreage was inhabited, most of it constituting rugged mountain areas. In the Hoopa Valley proper, which consisted of about 4,000 acres, there were a substantial number of the Hoopa tribe living in several villages as well as a number of Indians of the Redwood or Chilula tribe who had recently been induced to move into the valley. A group of Yurok Indians were living in the northern part of the tract in the canyon of the Trinity and to the west a short distance. (Fdg. 22, A. 27).

Since the Act of April 8, 1864 provided for no more than four reservations to accommodate all of the Indians of California and since there was a multitude of

tribes in the State, it was necessarily contemplated from the outset that the Hoopa Valley Reservation would be a multi-tribal reservation for the benefit of all of the Indians who were eventually accommodated thereon. (Fdg. 180, A. 100; Act of April 8, 1864, A. 113). It was contemplated that some 1800 Yurok Indians then living along the Klamath River would move to the reservation. (Fdg. 25, A. 27). In 1869, the government moved more than 300 Indians of the Saiaz or Nogatl, the Wiyot, Wylackie and Sinkyone tribes onto the reservation. (Fdg. 28(a), A. 28). Despite the vast acreage of the Hoopa Valley Reservation as originally established most of it was unsuitable for Indian habitation. Thus in 1891, in order to accommodate on this reservation the numerous Yurok Indians living nearby, President Harrison by Executive Order enlarged the reservation to include a strip one mile on each side of the Klamath River from the then northern boundary of the reservation at the junction of the Klamath and the Trinity to the Pacific Ocean. (Fdg. 33, A. 30). The lower twenty miles of this narrow strip was known as the Klamath River Reservation, an old military-type reservation established in 1855 to confine as many Indians as possible away from white settlers. This reservation had never been formally abandoned. Contrary to the erroneous assertions of petitioner the Klamath River Reservation was never designated as a reservation for the Yuroks. It was created in 1855 merely to confine there whatever Indians the Government saw fit. Various tribes, in addition to the Yuroks, inhabited this military reser-

vation at one time. The intervening strip of land along the Klamath River added to the Hoopa Valley Reservation by the Executive Order of 1891, often referred to as the Connecting Strip, had never theretofore constituted reservation land. (Fdgs. 1-9 and 34, A. 14-16 and 30-31).

The following year by the Act of June 17, 1892, 27 Stat. 52, the portion of this addition to the Hoopa Valley Reservation which had formerly constituted the old Klamath River Reservation was opened for public settlement subject to the prior allotment of homesites and the reservation of village sites for the Indians inhabiting that portion of the Hoopa Valley Reservation. (Fdg. 77, A. 51-52; Act of June 17, 1892, A. 115). This Court has recently ruled in *Mattz v. Arnett*, 412 U.S. 481 (1973) that the Act of June 17, 1892 did not have the effect of terminating the status of this area as part of the Hoopa Valley Reservation. Thus this Court by its decision in *Donnelly v. United States*, 228 U.S. 243 (1913) established that the 1891 addition to the Hoopa Valley Reservation was lawfully made by the President pursuant to the authority granted by the Act of April 8, 1864 and, by its decision in *Mattz v. Arnett*, confirmed that the entire addition remains part of the Hoopa Valley Reservation.

From the time the addition was made in 1891 up until the early 1950's the entire Hoopa Valley Reservation was administered as a single integrated reservation; all of its Indian inhabitants had unrestricted access to and use of all portions of the reservation

and were recognized as having equal rights thereon. (Fdgs. 35-36, 101-131, 167; A. 31, 67-84, 95).

In 1950 when the timber on the vast uninhabited acreage encompassed within the original boundaries of the reservation became commercially exploitable, a group of Indians on the reservation formed an organization of arbitrary composition which they denominated as "the Hoopa Valley Tribe" with the purpose of securing for themselves the benefits of the timber revenues from this area of the reservation to the exclusion of all of the other Indians having equal rights on the reservation. In 1952, the constitution and bylaws of this organization were approved by the Commissioner of Indian Affairs until such time as a suitable organization could be established under State law. (Fdgs. 136-156, A. 85-92). Beginning in 1955 this organization succeeded in obtaining annual per capita payments from the timber revenues from the original area of the Hoopa Valley Reservation exclusively for its members. (Fdgs. 169-172, A. 96-97). This action in the Court of Claims was instituted by all of the other Indians entitled to equal rights on the Hoopa Valley Reservation to obtain their rightful share of the revenues from the unallotted lands on the entire reservation.

In the Court of Claims, the United States and the Petitioner, as Amicus, contended that the Hoopa Valley Reservation as enlarged in 1891 constituted a tripartite reservation united for administrative purposes only and comprised of three separate sections insofar as substantive rights were concerned. This was a con-

tention never theretofore advanced and was simply dreamed-up by counsel in an attempt to retain for a select group of Indians the major benefits of the Hoopa Valley Reservation. It was argued that support for this theory existed in the manner in which the allotment program on the reservation was carried out. However, the Court of Claims found that the highly complex program for allotments on the reservation which extended from about 1890 to 1930 showed no trace of any plan, intention or understanding that the enlarged Hoopa Valley Reservation was composed of three segments insofar as substantive rights were concerned. (Fdg. 186, A. 104).

Since some of the Indians residing on the portion of the Hoopa Valley Reservation added in 1891 received individual allotments containing timber, petitioner seeks to create an impression that it would be unfair for the Indians residing on that portion of the reservation to participate in timber revenues from the unallotted lands of the original portion of the reservation. However, the entire question of individual allotments is irrelevant because plaintiffs seek only their rightful share of the unallotted lands of the reservation held in trust by the United States for the common benefit of all of the Indians of the reservation. Moreover at the time the allotments were made the allotments overgrown with timber in the steep canyon along the Klamath River were of little or no value to the recipients. The allotments made to the Indians in the fertile Hoopa Valley and the adjacent Bald Hills grasslands were far more useful and valuable.

ARGUMENT WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

This case presents no reasons for granting the writ of certiorari of the character set forth as guides in Rule 19 of this Court.

The Court of Claims has not rendered a decision in conflict with the decision of any other federal court.

The Court of Claims has not decided an important question of federal law which has not been, but should be, settled by this Court, nor decided a federal question in a way in conflict with the applicable decisions of this Court. To the contrary, the Court of Claims has decided the questions of federal law necessary for the resolution of this case in conformity with the decisions on these questions of law by this Court in *Donnelly v. United States,* 228 U.S. 243 in 1913 and in its very recent decision last year in *Mattz v. Arnett,* 412 U.S. 481, in which the decision and findings of the trial judge of the Court of Claims in the present case were extensively referred to.

Clearly the Court of Claims has not in any way departed from the accepted and usual course of judicial proceedings.

This case was considered by the Court of Claims upon an abundance of documentary evidence gathered through a number of years of discovery as well as upon the testimony of witnesses on behalf of the plaintiffs. Although the organization denominated as the Hoopa Valley Tribe, with the support of the United States, strenuously resisted participation in this case as a party until the eve of trial, nevertheless

the trial judge permitted the full participation of this organization in the trial and all of the post-trial briefing. Significantly, however, not one of the members of this organization which now claims to be so abused by the decision of the Court of Claims testified as a witness at the trial, although a number of them had been scheduled as witnesses in pre-trial statements filed with the Court.

Following the post-trial briefing which was extensive and in which the Hoopa Valley Tribe actively participated as Amicus, the trial judge spent nearly two years in meticulously analyzing the evidence and the arguments presented and in preparing voluminous and most carefully considered findings. After another round of extensive briefing following the filing by the United States and the Hoopa Valley Tribe, as Amicus, of objections to the trial judge's recommended decision and findings, and after oral argument, the seven judges of the Court of Claims unanimously adopted the decision and findings of the trial judge without a single change.

Petitioner advances three reasons for granting the writ all wholly lacking in merit and all based on inaccurate and misleading statements and unsupported assumptions.

Petitioner's first reason in essence is that:

> ". . . the decision (of the Court of Claims) will have the effect of divesting a major federally recognized American Indian tribe of control over its reservation and destroy its modern, vigorous tribal government."

The findings of the Court of Claims clearly show that the petitioner, the so-called "Hoopa Valley Tribe", which was not organized until 1950, constitutes a select group of arbitrary composition which is not an "Indian tribe" in either the ethnic sense[1] or in the sense of a group composed of all of the Indians entitled to share in the benefits of a particular reservation. (Fdgs. 136-156, A. 85-92). This organization has been wrongfully permitted to control the original twelve-mile-square portion of the Hoopa Valley Reservation and reap its benefits for its members to the exclusion of all of the other Indians having equal rights on the reservation, including many actually residing on this portion of the reservation. The decision of the Court of Claims will have the just and salutary effect of ending the wrongful domination of this organization and setting the stage for the formation of an organization representative of all of the Indians having rights on the entire Hoopa Valley Reservation and entitled to share equally in its benefits.

No portion of the Hoopa Valley Reservation is now or ever has been a reservation exclusively for the Hoopa Valley Tribe organized in 1950 or the ethnic group of Indians known as the "Hoopa" tribe. The terms of the Act of April 8, 1864, pursuant to which the Hoopa Valley Reservation exists, and the ruling of this Court in *Donnelly v. United States*, 228 U.S. 243 (1913) that it was properly enlarged by President

[1]It is important to recognize that the Hoopa Tribe and the other tribes that settled upon the Hoopa Valley Reservation had never historically been politically organized. (Fdg. 109, A. 76-77).

Harrison in 1891 pursuant to the continuing authority of such Act preclude the appropriation of any portion of the reservation for the exclusive benefit of any particular tribe. Since the Hoopa Valley Reservation was one of no more than four reservations required by Congress to be adequate to accommodate the multitude of California Indian tribes it could not be and was not reserved for the exclusive benefit of the Hoopa tribe.[2]

In its argument in support of its first reason for the granting of the writ, petitioner inaccurately contends that the decision of the Court of Claims would constitute a judicial taking of the last remnant of the ancestral homeland of the Hoopas contrary to the solemn promises made to their ancestors in the so-called "Wiley treaty". Quite apart from the fact that this document could not contravene the Congressional mandate expressed in the Act of April 8, 1864, never had any legal effect and has gone entirely unnoticed through the years, it did not even promise the Hoopa tribe the exclusive use of the original twelve-mile-square portion of the Hoopa Valley Reservation. By its terms it offered to provide a reservation for four named tribes, the Hoopa, South Fork, Redwood, and

[2]Petitioner complains that the decision of the Court of Claims is contrary to an opinion rendered by the Deputy Solicitor of the Department of the Interior in 1958, holding that the Hoopa Valley Tribe was entitled to the exclusive benefit of the original twelve-mile-square portion of the Reservation. However, this opinion was not rendered in any administrative proceeding after notice and hearing. It was nothing but an opinion written by "house counsel" for the Department of the Interior in an attempt to justify action already taken. As found by the Court of Claims this opinion does not reflect the facts found by the Court and contains both errors of commission and omission. (Fdg. 174, A. 98).

Grouse Creek and such other tribes as might thereafter avail themselves of its benefits. Moreover, the area for the reservation referred to in this document constituted only the southern half of the twelve-mile-square tract encompassed by the original boundaries of the Hoopa Valley Reservation. (Fdgs. 15-19, A. 19-25). The northern half of this twelve-mile-square tract, to the extent that it was inhabited, was occupied by Yuroks. (Fdg. 21, A. 26).

Petitioner also seeks to create the erroneous impression that any new governing body of the entire reservation would be dominated by non-resident Yuroks to the detriment of the Hoopas, who it is implied are all residents of the Reservation. The findings of the Court of Claims show that "many" of the members of the organization known as the Hoopa Valley Tribe were not residents of the reservation when its membership roll was transmitted to the Commissioner of Indian Affairs for approval. (Fdg. 148, A. 88). Moreover, the constitution and by-laws of the organization known as the Hoopa Valley Tribe (Defendant's Exhibit 135 in the Court of Claims) provides that the members of its governing council shall be elected from members of the organization who have resided at least one year in certain districts located in the small major populated area of the original portion of the Hoopa Valley Reservation. There is no basis for an assumption that the members of the governing body of any new organization representative of all of the Indians having equal rights on the entire Hoopa Valley Reservation would not be composed of Reservation resi-

dents of whatever tribe they might be in the ethnic sense.

In support of its argument in respect to its first reason for granting the writ, petitioner also attempts to create an impression that it would be unjust for all Indians entitled to rights on the Hoopa Valley Reservation to share equally in the timber revenues from the unallotted lands of the original portion of the reservation because some of them received individual allotments of land on the addition which contained timber. All of the individual allotments of land on the Hoopa Valley Reservation were made pursuant to the terms of the General Allotment Act of 1887, 24 Stat. 388. In the area of the reservation which had once been the old Klamath River Reservation, the Congress by the Act of June 17, 1892, directed that individual allotments be made pursuant to the General Allotment Act. In the remainder of the Hoopa Valley Reservation, allotments were made pursuant to the General Allotment Act by Presidential directive. The purpose of the General Allotment Act was to provide each Indian with an individual parcel of land on which he could maintain a settled home and hopefully sustain himself and his family by agricultural and pastoral pursuits. *United States v. Rickert*, 188 U.S. 432 (1903) at pages 437 and 442. In the narrow strip of the Hoopa Valley Reservation along the Klamath River, nearly all of the land available for individual allotment was steep mountainside land some of which contained timber. The Indians who wished to maintain a home in this area had to take the type of land that

was available even though little of it was truly suitable for agricultural or pastoral pursuits. In the original twelve-mile-square area of the reservation there was level fertile land available in the Hoopa Valley proper and open grazing land available in the adjacent Bald Hills area. This land was particularly suitable for the individual allotments contemplated by the General Allotment Act, and at the time of allotment was much more valuable to the individual Indian than any of the allotments in the area along the Klamath River, some of which were larger and overgrown with timber. All of the unallotted lands of the reservation were retained in trust by the United States for the common benefit of all of the Indians of the reservation. What benefits any particular individual may ultimately have reaped from his particular individual allotment is entirely irrelevant to the right of all Indians of the reservation to an equal share in the benefits of the unallotted trust land.[3]

The second reason advanced by petitioner for granting the writ is that if the Hoopa Indians did not obtain vested rights in the original portion of the reservation immune from dilution by the Executive Order of 1891 enlarging the reservation, those Indians accommodated on the reservation by such Executive

[3]Petitioner contends that if allotments containing timber had been made in the original twelve-mile-square portion of the Reservation, there would be little or no unalloted land left in this portion of the Reservation. This contention is completely erroneous. If all of the 365 persons allotted land in the Hoopa Valley proper and in the Bald Hills area had been given allotments containing timber of the maximum size of 160 acres permitted by statute only 58,400 of the 89,572 acres of the original portion of the Reservation would have been utilized.

Order could not thereby obtain any enforceable vested rights in the reservation. This is a wholly spurious argument. The mere fact that any of the Indians accommodated on a reservation by Presidential action pursuant to the Act of April 8, 1864 might have their rights diluted by later Presidential action accommodating additional Indians on such reservation does not constitute a basis for denying all Indians who have in fact been accommodated on such reservation equal rights to its benefits. Thus the Court of Claims has properly ruled that all of the Indians who have been accommodated on the Hoopa Valley Reservation pursuant to the Executive Orders of 1876 and 1891 are entitled to share equally in its benefits. This follows whether or not the President may still have some continuing jurisdiction to dilute these benefits in the future by accommodating additional Indians there.[4]

The third reason asserted by petitioner for granting the writ is that the decision of the Court of Claims improperly infringes on the political and administrative function of determining eligibility for membership in an Indian tribe. It is manifest that this is not the effect of the decision of the Court of Claims. The Court has exercised a proper judicial function, not in determining tribal membership, but in determining what Indians are entitled to share equally in

[4]It is noteworthy that the power of the President to dilute the rights of the Indians of the Hoopa Valley Reservation by changing its boundaries terminated with the passage of the Act of March 3, 1927, 44 Stat. 1347, Section 4 of which prohibits any change in the boundaries of Indian reservations except by Act of Congress. *Cf. Healing v. Jones*, 210 F. Supp. 125 at 181 (D. Ariz. 1962), aff'd, 373 U.S. 758 (1963).

the benefits of the Hoopa Valley Reservation pursuant to the Congressional mandate in the Act of April 8, 1864 and the implementing Executive Orders of 1876 and 1891. *Cf. Halbert v. United States,* 283 U.S. 753 (1931); *The Quinaielt Tribe v. United States,* 102 Ct. Cl. 822 (1945) and *Healing v. Jones,* 210 F. Supp. 125 (D. Ariz. 1962), aff'd 373 U.S. 758 (1963). The decision of the Court of Claims is in no way inconsistent with any of the cases cited by petitioner which hold that the determination of the right to membership in an Indian tribe is a political and administrative function.

CONCLUSION

For all of the reasons stated, the petition of the Hoopa Valley Tribe for a writ of certiorari to review the judgment of the United States Court of Claims in Short et al. v. the United States, No. 102-63 (October 17, 1973) should be denied.

Respectfully submitted,

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Jessie Short, et al.

WALLACE SHEEHAN,
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February, 1974

COURT, U. S.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE, *Petitioner*,

vs.

JESSIE SHORT, et al., and THE UNITED STATES,
Respondents.

OBJECTION OF RESPONDENTS JESSIE SHORT ET AL. TO MOTION OF SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER INDIAN RESERVATION, ARIZONA, FOR LEAVE TO FILE STATEMENT AMICUS IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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February, 1974

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The Salt River Pima-Maricopa Indian Community of the Salt River Reservation in Arizona has moved for leave to file a statement in support of the Petition

of the Hoopa Valley Tribe for a Writ of Certiorari to the United States Court of Claims.

The consent of Respondents Jessie Short et al. to the filing of the proposed statement was never even requested. However, Respondents oppose the motion for leave to file the statement inasmuch as neither the motion nor the proposed statement sets forth any valid reason why the filing of the statement would be appropriate to protect any interest of the moving party or would be of any assistance to this Court.

Moreover, the motion fails to comply with Rule 42 of this Court in that it fails to set forth any facts or questions of law that have not been presented by the parties or any reasons for believing that any facts or questions of law will not adequately be presented by the parties.

Both the motion and the proposed statement reveal a complete lack of comprehension of the nature and scope of the decision of the Court of Claims in *Short et al. v. The United States.*

The decision of the Court of Claims is grounded upon the interpretation of the Act of April 8, 1864, 13 Stat. 39 and the Executive Action implementing the Congressional purpose expressed in the statute. This statute was a unique one for the purpose of providing permanent reservations for all of the Indians in the State of California. It has no counterpart applicable to any other State. For this reason alone the decision of the Court of Claims can have no possible bearing on any interests of tribes on a reservation in the State of Arizona.

The moving party asserts that it fears that the decision of the Court of Claims will precipitate a flood of unjust and ill-founded claims upon the property of their reservation by neighboring, off-reservation, or other landless Indians and that the decision sanctions the exploitation of ancestral Indian lands by third and fourth generation off-reservation Indians. The decision of the Court of Claims has no such effect or import. Every one of the sample Indian plaintiffs who the Court of Claims has held are entitled to an equal share in the benefits of the entire Hoopa Valley Reservation were born on the Reservation, have resided there, and either they or their parents were listed on the rolls of the Hoopa Valley Reservation during the years that the Government maintained rolls alphabetically listing all of the Indians recognized as having rights on the Reservation. The Court of Claims has further found as a fact that half of the portion of the Hoopa Valley Reservation to which the organization known as the Hoopa Valley Tribe claims exclusive rights constituted ancestral lands of the Yurok, not the Hoopa Tribe.

It is asserted in the proposed statement that the decision of the Court of Claims poses a threat to the moving party because it departs from established law that membership in an Indian tribe is to be determined by the Tribe itself subject to the approval of the Secretary of the Interior, or the Congress. This the decision of the Court of Claims does not do. The Court has merely exercised the wholly proper and necessary judicial function of determining what

Indians are entitled to share in the benefits of a Reservation by virtue of the Act of Congress authorizing the establishment of the Reservation and the Executive action implementing the Congressional purpose.

The proposed statement says that the Indians of the Salt River Reservation in Arizona are predominantly Indians of the Pima and Maricopa Tribes. The action which the Court of Claims has held to be wrongful in respect to the Hoopa Valley Reservation in California would be comparable to a situation where some Pima Indians formed an organization to obtain for themselves alone a major portion of the Salt River Reservation to the exclusion of the Maricopa Indians and all other Indians of the Reservation. Had the decision of the Court of Claims been in favor of the organization known as Hoopa Valley Tribe it would have indeed imposed a threat to the Indians of the Salt River Reservation. The decision that has been rendered by the Court of Claims does not in any way affect any interest of the Indians of the Salt River Reservation.

CONCLUSION

For all of the reasons stated, the motion of the Pima-Maricopa Indian Community of the Salt River Indian Reservation in Arizona to file a statement amicus in support of the Petition of the Hoopa Valley Tribe for a Writ of Certiorari to the Court of Claims should be denied.

Respectfully submitted,

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Counsel for Respondents
Jessie Short, et al.

WALLACE SHEEHAN,
WILLIAM C. WUNSCH,
FAULKNER, MCCOMISH & WUNSCH,
Of Counsel.

February, 1974

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Petitioner,

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

BRIEF AMICI CURIAE OF ASSINIBOINE AND SIOUX TRIBES OF FORT PECK INDIAN RESERVATION, MONTANA, SHOSHONE TRIBE OF WIND RIVER RESERVATION, WYOMING, AND STANDING ROCK SIOUX TRIBE OF STANDING ROCK RESERVATION, NORTH DAKOTA AND SOUTH DAKOTA

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Petitioner,

v.

JESSIE SHORT, ET AL., and THE UNITED STATES,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Assiniboine and Sioux Tribes of Indians of the Fort Peck Indian Reservation, Montana, the Shoshone Tribe of Indians of the Wind River Reservation, Wyoming, and the Standing Rock Sioux Tribe of Indians of the Standing Rock Reservation, North Dakota and South Dakota, respectfully move this Court for leave to file the accompanying brief in support of the petition of the Hoopa Valley Tribe for a writ of certiorari in the above entitled case.

We believe it essential for the Supreme Court of the United States to clarify the nature and extent of Indian tribal rights on an Indian reservation which were treated by the Court of Claims in the decision below.

Respectfully submitted,

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IN THE

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I. Statement of Interest

The *amici* Indian tribes named above are all American Indian tribes, recognized by the Secretary of the Interior, and possess governing bodies which, subject to Congressional control and administrative actions taken pursuant to Congressional enactment, manage their own affairs, including the determination of entitlement to enrollment

within the tribes, which enrollment carries with it the concomitant right to share in the communal assets of the tribes, any distributions thereof and the powers of self-government.

The decision of the Court below affects *amici's* powers of self-government, reaching down to the most basic level, that of entitlement to enrollment in the various *amici* tribes. *Amici*, therefore, have a direct interest in the pending case.

Your *amici* support the position of the Hoopa Tribe and urge the Court to grant their petition for a writ of certiorari and reverse the decision of the court below.

II. The Court of Claims Has In Effect Taken From Indian Tribes the Rights of Self-Government and Self-Determination

Historically, Indian tribes, subject to administrative review under Congressional enactments, determine who shall be entitled to tribal enrollment and membership in the tribal body politic, which membership includes the right to participate in governing the tribe to its destiny and sharing in the tribal assets.

The United States Government, in the instant case, has repeatedly assured the Hoopa Indians of their exclusive rights to their aboriginal homelands on the original Hoopa Valley Reservation (the Square), and has strongly encouraged them to organize a modern, efficient tribal government for purpose of administering the resources of the Square. In fact, this is precisely what the Hoopa Indians have accomplished, by establishing a freely-elected governing body with power to administer reservation affairs. The government, through the offices of the Secretary of the Interior, has consistently affirmed these actions, *i.e.*, the Secretary considered and approved

the Hoopa Constitution and By-laws, and has distributed the assets of the Square exclusively to duly enrolled members of the Hoopa Valley Tribe of Indians.

All was as it should have been until the Court of Claims adopted the trial judge's opinion in *Short*, thereby assuming for itself the role of determining an individual claimant's eligibility for enrollment in an Indian tribe. This decision, in general, destroys a substantial measure of tribal sovereignty and, in particular, threatens irrevocably to destroy the efforts of the Hoopa Indians towards self-government, self-determination and, more importantly, self-identity.

It cannot be supposed that only the Hoopa Indians will be grievously affected by the ruling of the Court below, for most Indian tribes make capital distributions of tribal assets in appropriate circumstances. Henceforth, under the precedent now established, anyone denied enrollment in a tribe with the approval of the Secretary of the Interior need merely sue in the Court of Claims to have that denial reviewed and reversed. The Court then may do as it did below, establish its own criteria of enrollment, after reviewing a century of legislative and administrative acts, and grant or deny enrollment by awarding or denying the claim. This is in clear violation of the established principle that tribal membership, for purposes of capital asset distribution, is a subject of Congressional or tribal initiative. *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899); *Martinez* v. *Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957).

III. Conclusion

The petition for certiorari of the Hoopa Valley Tribe should be granted.

Respectfully submitted,

MARVIN SONOSKY
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CERTIFICATE OF SERVICE

This is to certify that I have this 14th day of February, 1974, served the attached Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae on the Hoopa Valley Tribe, petitioner, by delivering three copies to its counsel of record, Jerry C. Straus, Esq., Wilkinson, Cragun & Barker, 1735 New York Avenue, N.W., Washington, D.C. 20006, on the United States, respondent, by mailing three copies, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and on Jessie Short, et al., respondents, by mailing three copies, airmail postage prepaid, to their counsel of record, Harold C. Faulkner, Esq., and William C. Wunsch, Esq., Faulkner, McComish & Wunsch, 351 California Street, San Francisco, California 94104.

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FEB 22 1974 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE,

Petitioner,

v.

JESSIE SHORT, ET AL., and
THE UNITED STATES,

Respondents.

Motion

Amicus Curiae Brief On Behalf Of The Fort Mojave Indian Tribes Of Arizona, California, Nevada, The Cortina Rancheria Of California, The Stewart's Point Rancheria (Kashia Band) Of California, The Los Coyotes Reservation Of California, The Pauma Reservation Of California, The Covelo Indian Community (Round Valley) Of California, The Colorado River Indian Tribes Of Arizona, And The California Tribal Chairmens Association

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Amicus Curiae Brief On Behalf Of The Fort Mojave Indian Tribes Of Arizona, California, Nevada, The Cortina Rancheria Of California, The Stewart's Point Rancheria (Kashia Band) Of California, The Los Coyotes Reservation Of California, The Pauma Reservation Of California, The Covelo Indian Community (Round Valley) Of California, The Colorado River Indian Tribes Of Arizona, And The California Tribal Chairmens Association

Amici Curiae do hereby respectfully move for leave to file a brief Amicus Curiae in this case, in support of Petitioner, as provided in Rule 42 of the Rules of the Court. The consent for the attorneys for the Petitioner has been granted. The consent of the attorneys for the Respondents has not been granted.

Amici Curiae, with the exception of the California Tribal Chairmens Association are American-Indian Tribes who have been duly recognized by the Federal Government. Their reservations are located in the States of Arizona, California and Nevada. They are all Executive Order reservations. The California Tribal Chairmen's Association represents approximately 32 elected or appointed chairmen of reservations and federally-recognized Indian tribes in California.

Amici Curiae are extremely interested in doing whatever is necessary and proper to both strengthen their tribal governments and to precipitate economic development upon their reservations. In order to accomplish these objectives, it is imperative that their legal status be undisputed, thereby making it possible for them to proceed with programs for economic development which of necessity must include the exercise of governmental powers, the power to contract, to lease, to encumber, to sell, to purchase, and other economic vehicles designed to achieve economic progress. If the judgment of the Court Below is permitted to stand, it is the sincere opinion of Amici Curiae that this would constitute such a serious blow to tribal government as to destroy the economic development programs currently being pursued by them. With this in mind, Amici feel that their contribution in the form of a brief Amicus Curiae should assist this Honorable Court in its determination of the critical, legal issues presented by the case at bar.

Wherefore, it is respectfully prayed that this Motion for Leave to file the Amicus Curiae brief on behalf of Amici should be granted.

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INTEREST OF AMICI CURIAE

Amici Indian tribes are all duly recognized tribes of American Indians whose reservations are located in three States, namely: Arizona, California and Nevada. The lands comprising their reservations are valuable from an appraisal's point of view, but they cannot eat dirt, so it must be deemed virtually valueless until they are economically developed. The California Trial Chairmens Association represents reviews of the governing bodies of numerous federally recognized Indian tribes in California.

In their desire to implement economic development programs, Amici have become acutely aware of the commercial requirement that economic development of their lands makes it imperative that their governing bodies must enjoy such attributes of sovereignty as to eliminate any question regarding their capacity to perform on behalf of their respective tribes and that they possess a clear and unquestioned title to their

lands. The judgment of the Court Below clearly challenges the right of a tribe to determine its own membership by finding that Indians of another tribe, the Yuroks, are entitled to participate in the economic benefits of the development programs implemented by the Hoopa Tribe. This conclusion constitutes a challenge to tribal sovereignty, and precipitates a serious question regarding the vested interest of Indian Tribes with Executive Order reservations. Hence, since Amici desire to achieve effective economic development on their reservations, they sincerely believe that they have a vital interest in the outcome of the case at bar.

QUESTIONS PRESENTED

The questions presented by the case at bar are:

1. Is the judgment of the Court Below incompatible with the legal sovereignty of the Hoopa Tribe?

2. Does the judgment of the Court Below disregard the Doctrine of "Recognized Title"?

REASONS FOR GRANTING THE WRIT

Amici Curiae join Petitioner in asserting all of the reasons set forth in the Petition for a Writ of Certiorari. The Petition comprehensively discusses the various areas in which the Court Below erred, and states excellent reasons why this Honorable Court should review the matter. Amici desire to place special emphasis in this brief on the consequences of the decision below for Indians throughout this nation, and its negative impact on Federal Indian policy.

I.

The Judgment Of The Court Below Is Tantamount To An Interference With Tribal Sovereignty.

On July 8, 1970, the President in a Message to Congress, said:

> "The destiny of Indians and Indian communities throughout the United States is dependent upon their ability to utilize productively their remaining lands and natural resources. The federal government has acknowledged its trust responsibility to Indians, which arises out of a history of unfortunate relations between the nation and its original inhabitants. In pursuance and fulfillment of this responsibility, the government has afforded certain advantages to its Indian wards. Special treatment and programs for Indians are necessary to compensate for unconscionable dealings with the Indians in the past and to remedy the most alarming present state of abysmal poverty and despair that typifies Indian communities."

One of the primary purposes of the Bureau of Indian Affairs is to implement a federal policy to change this situation. Every year, as part of its proposed budget for the coming fiscal year, the Bureau of Indian Affairs makes the following statement to the House and Senate Appropriation Subcommittees when considering its budget request:

> "The ultimate goals of the Bureau of Indian Affairs for the Indian people are maximum eco-

> nomic self-sufficiency, equal participation in American life and equal citizenship privileges and responsibilities. The Bureau is working toward two basic programs, one of which is education, and the other is the economic development of reservation resources."

The United States recognized that the reservation system imposed severe limitations on the ability of the Indians to maintain a livelihood. Limitation of land area changed traditional patterns of living; confinement to lands which were unfertile and short of water made it difficult to eke out even a subsistence standard of living; and removal to new, often strange areas was destructive of family and community which is the basis of cultural identity and social structure.

With a gradual decline in direct subsidies and a realization that paternalism would only foster continued dependence, there has emerged a Federal policy of encouraging economic development and self-sufficiency. This policy was implemented by means of several economic programs and incentives. The future of these programs is in great doubt, however, if Indians can lose both their tribal status and property by judicial fiat.

From the earliest years of the Republic, Indian Tribes have been recognized as "distinct, independent, political communities." *Worcester v. Georgia*, 6 Pet. 515, 559 (1832). In accordance therewith they were qualified to exercise powers of self-government, not

by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty. Thus, treaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers, or, at most evidences of recognition of such powers rather than as the direct source of tribal powers. This is but an application of the general principle that "it is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror." *Wall v. Williamson*, 8 Ala. 48, 51. In fact, in 1959 the United States Supreme Court made it clear that the law had not changed on this subject when it stated that "over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained." *Williams v. Lee*, 358 U.S. 217, 219.

Perhaps the most basic principle of all Indian law, supported by a host of decisions, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express Acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian Tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the

judgment of Congress, these tribes could no longer be safely permitted to handle. Statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content.

The Acts of Congress which appear to limit the powers of Indian tribes are not to be unduly extended by doubtful inference. What was said in the case of *In re Mayfield*, 141 U.S. 107 is still pertinent:

> "The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy and to construe the acts of the legislative authority in consonance therewith."

In point of form, it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth, or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the tribe. The status of Indian nations or tribes, preserving their political entity under the decisions of the Supreme Court, has been summed up in Felix Cohen's "Handbook of Federal Indian Law," at 122, as follows:

> "The whole course of judicial decision and the nature of Indian tribal powers is marked by ad-

> herence to three fundamental principles: (1) An Indian tribe possesses in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to legislative powers of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

In *United States v. Kagama*, 118 U.S. 375, 381-82 (1886), this Court summed up the status of the Indian in the following language:

> "They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relation; not as states, not as nations, not as possessors of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, thus far not brought under the laws of the Union or of the State within the limits they reside."

The acknowledgment of tribal sovereignty or autonomy by the courts of the United States has not been a matter of lip service to a venerable but out-

moded theory. The doctrine has been followed through the most recent cases, and from time to time carried to new implications. Moreover, it has been administered by the courts in a spirit of genuine respect. In fact, the painstaking analysis by the Supreme Court of tribal laws and constitutional provisions in the Cherokee intermarriage cases, (203 U. S. 706) is typical, and exhibits a degree of respect proper to the laws of a sovereign state.

The whole course of congressional legislation with respect to the Indians has been based upon a recognition of tribal autonomy. As was said in a Report of the Senate Judiciary Committee (prior to the enactment of the United States Code, Title 18, Sec. 548); "Their right of self-government, and to administer justice among themselves, after their rude fashion, even to inflicting the death penalty, has never been questioned." (Sen. Report No. 268, 41st Congress, 3rd Session). In fact, the courts have consistently seen fit to view the status of Indian tribes and the sovereignty possessed by them as being above the sovereignty accorded states. For instance, in the case of *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959), the Court said:

> "But as declared in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all power as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."

From the foregoing, it should be apparent that the Hoopa Tribe possesses that all-important attribute of sovereignty which includes the power to determine its own membership and the right to participate in the income derived from tribal property, and that no court should be allowed to usurp or undermine this attribute of sovereignty.

II.

The Judgment Of The Court Below Failed To Consider The Doctrine Of Recognized Title.

It is quite clear from the opinion of the Court of Claims in the case at bar that there was considerable reliance upon the case of *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). Standing alone, this might be viewed as a sufficient foundation for the Court's opinion, but it must be respectfully noted that this would amount to a disregard of the Doctrine of "Recognized Title".

Historically, title in land has been granted to Indian tribes through treaties, trust patents, and by purchase. See Federal Indian Law, 1958 ed. at 592-613. The lands in question were established by Executive Order. Amici concede that Executive Orders, *per se*, do not have the effect of conveying title to tribes. The historical effect of Executive Orders regarding the Indians' legal rights is summed up in Federal Indian Law, *supra*, at 620:

> "Comparatively few questions have arisen as to the interpretation of Executive Orders establish-

> ing Indian reservations. One such question was raised before the Court of Claims in the Case of Crow Nation v. United States (cites). According to that court, the phrase in controversy reserving an area for the Crow Tribe 'and such other Indians as the President may, from time to time, locate thereon' gave the Crow Tribe . . . 'only the right to reside upon the reservation, so set apart by Executive Order, and did not confer upon them any definite title or particular interest in the land. It was in the nature of a tenancy by sufferance or residential title' ". (p. 278 of case).

Recently, however, the United States Supreme Court has reappraised the legal effect of the Executive Order Reservation and has pointed out that Congress and the Executive branch of the government have recognized certain lands as reservation lands, and that the classification of "tenants at sufferance" no longer applies. In deciding that navigable waters could be reserved for Indian Reservations by Executive Order, the Court said:

> "Arizona also argues that, in any event, water rights cannot be reserved by Executive Order. Some of the reservations of Indian lands here involved were made almost 100 years ago, and all of them were made over 45 years ago . . . Congress and the Executive have ever since recognized these as Indian Reservations. Numerous appropriations, including appropriations for irrigation projects, have been made by Congress. They have been uniformly and universally treated as

> reservations by map makers, surveyors, and the public. We can give but short shrift at this date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive." *Arizona v. California*, 373 U.S. 546, 598 (1963).

The evidence entitled to judicial notice by this Honorable Court graphically demonstrates that the Hoopa Tribe has received both Congressional and Executive recognition of their reservation. Furthermore, this conclusion was amplified by the members of the Hoopa Tribe who by reason thereof agreed to take small allotments so that the large timberland that remained could be administered by their tribal government for their economic benefit. Magnification of this recognition by the Executive branch of the government cannot be denied when one deliberates upon the representations of the Federal Government's agents who informed the Hoopa Tribal Government that the timberland in question belonged to their tribe, and that the income therefrom would be divided among their members. Any other conclusion would result in such severe and detrimental reliance that it cannot in the name of justice be tolerated. In other words, the Court of Claims certainly should have employed the Doctrine of "Recognized Title" thereby clearly avoiding such an unjust result.

CONCLUSION

Certiorari should, therefore, be granted in this case for all of the reasons set forth in this brief, Amici do hereby urge this Honorable Court to grant certiorari so that this vitally important case may be decided upon its merits.

Respectfully submitted,

RAYMOND C. SIMPSON
Counsel for Amici Curiae

SUPREME COURT, U. S.

FEB 28 1974

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE,
Petitioner,
v.
JESSIE SHORT, *et al.*, and THE UNITED STATES,
Respondents.

MOTION OF QUINAULT TRIBE OF INDIANS OF THE QUINAULT RESERVATION, WASHINGTON FOR LEAVE TO FILE STATEMENT AMICUS IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

AND

STATEMENT OF QUINAULT TRIBE OF INDIANS OF THE QUINAULT RESERVATION, IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE OF INDIANS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

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The Quinault Tribe of Indians of the Quinault Reservation, Washington, moves for leave to file the attached statement, as *amicus curiae*, in support of the petition of the Hoopa Valley Tribe of Indians for a writ of certiorari to review the decision of the United States Court of Claims in *Short v. United States*, No. 102-63 (Oct. 17, 1973).

The decision of the Court of Claims below threatens the rights of members of the Quinault Tribe in the property of

their Indian reservation and threatens to extinguish the Tribe's power over tribal enrollment on the reservation.

I.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Quinault Tribe of Indians is an organized, self-governing Indian tribe located on the Quinault Reservation in the State of Washington. The Quinault Tribe feels that the orderly administration of Indian policy will be seriously disrupted by the Court of Claims decision in *Short v. United States*, No. 102-63 (Oct. 17, 1973), and to the extent that the decision diminishes the nature of Indian title, and to the extent that the decision removes from the Tribe its proper function of determining tribal enrollment for purposes of substantive rights, the Quinault Tribe will suffer immediate and possibly irreparable harm. Therefore, the Quinault Tribe supports the petition of the Hoopa Valley Tribe of Indians for a writ of certiorari.

1. The decision of the United States Court of Claims, in *Short v. United States*, No. 102-63 (Oct. 17, 1973), has profound implications for all Indian tribes in the United States. The holding of the Court of Claims will have the effect of forcing the Hoopa Indians, over their own objections and those of the United States, to surrender control over their reservation to a foreign group of Indians. The Court of Claims, by its decision, has shifted ownership of a reservation, gained by the Hoopas by an "Executive Treaty" and confirmed by course of conduct, from the Hoopas to a larger group of which the Hoopas are a minority. If the decision in *Short* is allowed to stand the economic and political future of the Hoopa Valley Reservation, and thus the Hoopa Indians, will be in the hands of

the new Yurok majority. *Amicus* submits that the future of a reservation and culture of a distinct, federally recognized Indian tribe should not be determined without consideration by the highest judicial tribunal of the land.

2. In order to execute its judgment in *Short*, the Court of Claims must consider the claims of thousands of individual Yurok Indians for entitlement to a proportionate share of the resources of the Square portion of the Hoopa Valley Reservation. In other words, the court below must now enumerate the individual members of the Hoopa Valley Reservation who are entitled to share in the distribution of the Square's resources. The determination of tribal membership is not properly within the jurisdiction of the Court of Claims. Such power has been held to reside in the Indian tribe, subject to the approval of the Secretary of the Interior or, alternatively with Congress. *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957). Nor can it be said that this function has been waived by the Tribe or the Secretary. On the contrary, the Tribe, with the encouragement and approval of the Secretary, has organized a tribal government and compiled a comprehensive tribal roll. The Solicitor's Office ruled, in 1958, that the Hoopa Valley Tribe of Indians was entitled to exclusive distribution of the resources of the Square, and that the Yurok Indians were not so entitled. *Rights of Indians in the Hoopa Valley Reservation, California*, 65 I.D. 59 (1958). The Court of Claims' decision to the contrary is an encroachment upon the sovereignty of the Tribe and upon the prerogatives of the Executive Branch.

II.

CONCLUSION

The petition of the Hoopa Valley Tribe of Indians for a writ of certiorari to the United States Court of Claims.

Respectfully submitted,

MICHAEL TAYLOR
Of Counsel

PETER GREENFIELD
Amicus Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE, *Petitioner,*

vs.

JESSIE SHORT, et al., and THE UNITED STATES,
Respondents.

OBJECTION OF RESPONDENTS JESSIE SHORT ET AL. TO MOTIONS FOR LEAVE TO FILE AMICUS BRIEFS OR STATEMENTS IN SUPPORT OF PETITION OF HOOPA VALLEY TRIBE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS FILED BY:

Colville Confederated Tribes of the Colville Indian Reservation, Washington;

The Colorado River Indian Tribes;

National Tribal Chairmen's Association;

National Congress of American Indians;

Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, Montana; Shoshone Tribe of Wind River Reservation, Wyoming; and Standing Rock Sioux Tribe of Standing Rock Reservation, North Dakota and South Dakota;

The Fort Mojave Indian Tribes of Arizona, California, and Nevada; The Cortina Rancheria of California; The Stewart's Point Rancheria (Kashia Band) of California; The Los Coyotes Reservation of California; The Pauma Reservation of California; The Covelo Indian Community (Round Valley) of California; The Colorado River Indian Tribes of Arizona, and the California Tribal Chairmen's Association;

The Quinault Tribe of Indians of the Quinault Reservation, Washington.

Respondents, Jessie Short et al., have previously filed their objection to a motion by the Salt River

Pima-Maricopa Indian Community of Arizona for leave to file a statement amicus. Respondents entered such objection because the motion failed to demonstrate any interest of the Salt River Pima-Maricopa Indian Community which would be in any manner adversely affected by the decision of the Court of Claims in the present case.

The seven subsequently filed motions seeking leave to file amicus briefs or statements in support of the petition of the Hoopa Valley Tribe for certiorari similarly fail to show that any interest of the moving parties would be threatened by the Court of Claims' decision.

None of the moving parties even sought the consent of respondents to the filing of the proposed briefs or statements. All of the motions and the proposed briefs or statements have such a distinctly partisan flavor that it is evident they have been presented with the view of promoting the interests of the organization of Indians known as the Hoopa Valley Tribe rather than for the purpose of protecting any legitimate interest of the moving parties or of providing assistance to this Court.

All of the motions but one totally ignore Rule 42 of this Court requiring that such motions set forth facts or questions of law that have not been presented by the parties or reasons for believing that any facts or questions of law will not be adequately presented by the parties. The motion of the Colorado River Indian Tribes makes a brief reference to this require-

ment at page 3, but does not purport to set forth any facts or questions of law that have not been presented by the parties, and gives no specific reasons for believing that any facts or questions of law will not be adequately presented by the parties.

All of the motions and the proposed briefs or statements exhibit such a total misconception of the opinion and findings of the Court of Claims that it does not appear that they could be based upon any real analysis or even consideration of the opinion and findings of that Court.

All of the motions make the same principal and misconceived assertion that the Court of Claims has improperly interfered with the autonomy of an Indian tribe and its right of self-government and has exercised the power primarily vested in the Congress to determine tribal membership for the purpose of the distribution of tribal assets. Yet it is readily apparent that the decision of the Court of Claims does not deprive any Indian tribe of its autonomy nor establish criteria for enrollment therein. Assuming that the conglomerate group of Indians organized in 1950 under the name "Hoopa Valley Tribe" has the legal status of an "Indian tribe," the decision of the Court of Claims does not require this organization to alter its membership criteria nor does the Court's decision in any other way interfere with its autonomy and right of self-government. The Court of Claims has ruled only that the members of this group cannot have the exclusive benefit of the major portion of

the common lands of a multi-tribal reservation in which other Indians are entitled to share equally.

In making this ruling, the Court of Claims has exercised the necessary and proper judicial function of determining what Indians are entitled to share equally in the benefits of the Hoopa Valley Reservation pursuant to the Congressional mandate in the Act of April 8, 1864, 13 Stat. 39, and the implementing Executive Orders of 1876 and 1891. *Cf. Halbert v. United States*, 283 U.S. 753 (1931); *The Quinaielt Tribe v. United States*, 102 Ct. Cl. 822 (1945) and *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), aff'd 373 U.S. 758 (1963). The decision of the Court of Claims does not infringe upon the authority of Congress, but rather recognizes and protects Congressional authority, by holding invalid arbitrary administrative action which ignored the Congressional purpose in enacting the Act of April 8, 1864 as well as the intent of the implementing Executive Orders.

The joint motion and proposed amicus brief of The Fort Mojave Indian Tribes and several other Indian groups, asserts that the Court of Claims, in arriving at its decision, failed to consider the doctrine that Indian title can be acquired by bare Executive Order followed by continued governmental recognition, and consequently endangers Indian title based on such doctrine. However, the decision of the Court of Claims is not the result of disregard of such doctrine, but rather is based upon findings which make the doctrine inapplicable.

The Hoopa Valley Reservation was not established by a bare Executive Order, but was established by Executive Orders implementing an Act of Congress authorizing the establishment of such Reservation. The Court of Claims found that this Act of Congress and the implementing Executive Orders were intended to vest in all of the Indians accommodated on such Reservation an equal right to its benefits and not to vest the exclusive right to the major portion of the Reservation either in the members of the organization known as the Hoopa Valley Tribe or in the members of the ethnic, group, the Hoopa Tribe.

CONCLUSION

For the reasons stated, all of the motions for leave to file amicus statements or briefs in support of the Petition of the Hoopa Valley Tribe for a Writ of Certiorari to the Court of Claims should be denied.

Respectfully submitted,

HAROLD C. FAULKNER,
Counsel for Respondents
Jessie Short, et al.

WALLACE SHEEHAN,
WILLIAM C. WUNSCH,
FAULKNER, MCCOMISH & WUNSCH,
Of Counsel.

March, 1974

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No. 73-1104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

THE HOOPA VALLEY TRIBE,
Petitioner,

v.

JESSIE SHORT, ET AL., and THE UNITED STATES,
Respondents.

PETITIONER'S REPLY TO BRIEF OF RESPONDENTS JESSIE SHORT ET AL. IN OPPOSITION TO PETITION OF HOOPA VALLEY TRIBE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE,
Petitioner,

v.

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PETITIONER'S REPLY TO BRIEF OF RESPONDENTS JESSIE SHORT ET AL. IN OPPOSITION TO PETITION OF HOOPA VALLEY TRIBE

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1. The Court need not reach respondents' jurisdictional challenge. Whatever status the petition of the Hoopa Valley Tribe might have standing alone, the Court indisputably has jurisdiction to grant the writ upon the petition of the United States filed on February 13, 1974.[1] Under Supreme Court Rule 21(4), the Hoopa Valley Tribe, made a party below, is "deemed" a party in this Court for purposes of seeking review on certiorari. In any case, this Court has broadly construed the provisions of 28 U.S.C. § 1255(1) (1970) to allow the grant of a petition for certiorari filed by a third party with status comparable to that granted the Hoopa Valley Tribe as intervenor. *See United States* v. *Mason*, 412 U.S. 391, 394 n.6 (1973).

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[1] Docket No. 73-1244.

2. Conveniently ignoring the provisions of the Act of June 17, 1892,[2] which decreed that the proceeds from the sale of the unallotted lands of the Klamath River Reservation were to be used exclusively for the benefit of "the Indians now residing on said lands and their children," respondents falsely state that all of the unallotted lands of the Hoopa Valley Reservation, as extended in 1891, "were retained in trust by the United States for the common benefit of all of the Indians of the reservation."[3] To the contrary, as long ago as 1904, it was expressly recognized by the Department of the Interior that the 1892 Act meant what it said, *i.e.*, that its primary purpose was to preserve the rights of the Indians located on the Klamath reservation" (*i.e.*, the Yuroks), and that "Congress in the act of June 17, 1892 *in effect recognized these Indians as a tribe, as well as their claims to the lands in the Klamath reservation . . .*" (Emphasis supplied) *Crichton* v. *Shelton*, 33 L.D. 205, 218-19 (1904).

Subsequently, the Secretary of the Interior, with Presidential approval, restricted allotments on the Connecting Strip "to the Indians located thereon"[4] and, many years later, instructed that allotments on the Square were to be "divided as equitably as possible among the Indians located thereon. . . ."[5] Thus, it is undisputed that the lands of the three parts of the Hoopa Valley Reservation (Klamath River Reservation, Connecting Strip and Square) were exclusively allotted to the Indian residents of each particular part at different times,[6] in different

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[2] 27 Stat. 52. Reproduced as Petitioner's Appendix C at 115-17.

[3] Brief of Respondents Jessie Short, *et al.* in Opposition to Petition of the Hoopa Valley Tribe (February 14, 1974) (hereinafter "Respondents' Brief") at 20.

[4] Petitioner's Appendix A (hereinafter "App. A") at 55.

[5] App. A at 59.

[6] App. A at 52-67.

amounts of acreage,[7] and in such manner as to deny the Hoopas of the Square individual rights in timberland comparable to those granted earlier to the Yuroks of the Addition.[8] The final result of this allotment program was that only 35 non-Hoopas received allotments on the Square, and they were long-time residents there. Similarly, only four Hoopas are known to have received allotments on the Klamath River Reservation and Connecting Strip, and they were long-time residents there.[9] This division of the Hoopa Valley Reservation was either directly commanded by Congress (in the case of the Klamath River Reservation) or followed naturally from

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[7] App. A at 56, 58, 61. Respondents falsely state that the Act of June 17, 1892 provided for the "allotment of homesites" on the Klamath River Reservation (Respondents' Brief at 11). This statement is totally misleading and completely ignores the findings of the court below that allotments on the Klamath River Reservation, pursuant to the 1892 Act, averaged 60 acres each (App. A at 56) and included timberland, whereas allotments on the Square were small agricultural allotments, "averaging 8 acres." (App. A at 61)

[8] Respondents' contentions (Respondents' Brief at 20 n.3) as to the effect of granting timber allotments to the Hoopas on the Square are highly misleading. A total of 406 persons eventually received allotments on the Square (365 allotments were approved in 1922-1923 (App. A at 61), and 41 additional allotments were approved as late as 1933 and 1950 (App. A at 66)). The grant of full 160 acre allotments to 406 persons would have yielded a total acreage of 64,960. Moreover, in 1932, just prior to the time when the allotment program was essentially completed there were 561 Indians residing on the Square who would either have been eligible for timberland allotments to fill out miniscule agricultural or grazing land allotments previously received or, if unallotted, for new allotments. (App. A at 62). If all of these had received 160 acre allotments this would have yielded a total of 89,760 acres. It should be noted that only 69,086 acres of the Square is "forest land" (EDA, The Hoopa Valley Reservation Hardwood Study Report, Clinic of Wood, at 11 (1968)) not all of merchantable quality, and it would not have been possible to give all eligible Hoopas timber allotments of anything close to 160 acres.

[9] App. A at 67. *See* Petition of Hoopa Valley Tribe (hereinafter "Petition") at 6 nn.15, 17 and at 7 n.21.

the Congressional intention implicit in the 1892 Act that the resident Indians of each tract of the reservation were entitled to retain substantive rights in their own particular area. It should be noted that such a division of substantive rights within one "reservation" was far from unique. Indeed, the so-called Mission Reservation provided specific precedent of a California Indian Reservation established pursuant to the 1864 Act and made up of a number of subreservations in which each band of Indians obtained exclusive substantive rights to the area which it theretofore had aboriginally occupied.[10]

3. Unable to refute our assertion that the decision of the Court of Claims would destroy the Hoopa Valley Tribe, and, indeed, arguing that a new "representative" organization should be formed, respondents allege that the Hoopa Valley Tribe is not a tribe at all, but rather a "select group of arbitrary composition" (Respondents' Brief at 16), formed by a "group of Indians on the reservation" (Respondents' Brief at 12) with no special rights. On the contrary, the record shows that the federally-recognized Hoopa Valley Tribe of Indians is the anthropological successor to the aboriginal Hoopa Tribe which, together with its Redwood allies, and a few Yuroks and other non-Hoopa Indian residents of the Square, were granted rights on the 12-mile Square, the original Hoopa Valley Reservation of 1864, and have endured there to this day.[11] They operate a modern tribal government,

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[10] *See* Petition at 13 n.38; Defendant's Exhibit (hereinafter "Def. Ex.") 55 at 21.

[11] One of the few California tribes with an overall chieftainship (Def. Ex. 144-5 at 582; *Cf.* App. A at 19-20), the Hoopas of the Square had a functioning tribal council as early as 1916 (App. A at 59-61). In 1933, they formed a Hoopa Business Council of Indians elected exclusively from residents of the 12-mile Square (App. A at 83). Membership in the Hoopa Tribe at that time (App. A at 83-84), as in the presently organized Hoopa Valley Tribe (App. A at 90-92) was not restricted to those purely of Hoopa blood. Trial judge Schwartz acknowledged that the Hoopa Business Council of

offering many typical tribal government services on the reservation.[12] We concede that the Hoopa Valley Tribe is not an absolutely pure tribe, in the sense of 100% descent from a single anthropological group, but it is essentially so, and is far from being an "arbitrarily composed" group, as respondents would have the Court believe.

Contrary to respondents' assertion (Respondents' Brief at 18), the Hoopas do not state or imply that all of their members reside on the Square. However, the truth is that while most respondents do not live on any of the three subreservations comprising the Hoopa Valley Reservation, most of the Hoopas do live on the Square.[13]

It is inescapable that the overwhelming majority voice of voters of any new organization formed to represent the Hoopas and Yuroks jointly will necessarily belong to the far more numerous off-reservation Yurok Indians—a fact respondents do not deny. It is ludicrous for respondents to suggest that control of the reservation would be surrendered by the off-reservation majority to the Indians of the reservation (Respondents' Brief at 18-19).

4. In an effort to minimize the deep-rooted ties of the Hoopa Valley Tribe to the Square, respondents erroneously state that at the time the original Hoopa Valley Reservation was established, "[t]he northern half of this twelve-mile-square tract, to the extent that it was inhabited, was occupied by Yuroks" (Respondents' Brief at 18). This is not true. Respondents ignore the established presence, in 1864, of Redwood and Chilula Indians,

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1933 was the "predecessor" of the Hoopa Valley Business Council (App. A at 88).

[12] *See* Petition at 9 n.27.

[13] According to current records of the Bureau of Indian Affairs, approximately 14% of respondents live on the Addition to the Hoopa Valley Reservation, as compared with approximately 63% of the Hoopa Valley Tribe who presently live within the limits of the 12-mile Square.

and other constituent Hoopa bands or allies,[14] who occupied the Bald Hills area, in and around Redwood Creek, in the northern portion of the Square.[15] Furthermore, the precipitous canyon area in the northern half of the Square was *Hoopa* aboriginal territory.[16]

More importantly, however, the trial judge found that at the time the Square was confirmed as a reservation by Executive Order in 1876, there were only 44 Yuroks [Klamath] Indians residing on the Square, as opposed to 511 Hoopas, or approximately 8% of the total Indian population (App. A at 29).[17] This apparently resulted

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[14] According to A.L. Kroeber, "[t]he Chilula, who constitute one larger ethnic group with the Hupa and Whilkut [Redwood], are almost indistinguishable from the Hupa in speech. . . ." [Kroeber, Handbook of the Indians of California (Def. Ex. 144-7) 137 (1925)]. These tribes of Athabascan linguistic stock are among the Indian groups comprising the present day Hoopa Valley Tribe of Indians which has always shared in the resources of the Square. App. A at 90-92.

[15] Def. Ex. 144-11 at 483, 519. Def. Ex. 144-4 at 266-67.

[16] Dr. Kroeber leaves no doubt as to Hoopa dominion over the north canyon area:

> "In spite of the proximity of a group of populous Yurok settlements at this confluence [of the Trinity and Klamath Rivers], *the canyon, or nearly all of it, belonged to the Hupa*, who now and then seem even to have built houses at two or three points along its course." (Emphasis supplied.) [Def. Ex. 144-7 at 128.]

While the trial judge ruled (erroneously we say) that the canyon of the Trinity near its junction with the Klamath "was native territory of the Yuroks" (App. A at 26), he never found that the northern half of the Square was inhabited exclusively by Yuroks.

[17] In marked contrast, this Court determined that the Yurok population on the Klamath River Reservation alone was approximately 2,500 in 1852, 900 in 1895, and 668 in 1910. *Mattz* v. *Arnett*, 412 U.S. 481, 488-89 (1973). The vast majority of the Tolowa Indians removed there in 1856 immediately returned to their former territory. App. A at 15. Thus, it is false to aver, as do respondents, that the Klamath River Reservation was never established as a reservation for the Yurok Indians (Respondents' Brief at 10). Indeed, this Court has specifically stated that the site of the Klamath

from the deliberate decision of Superintendent Wiley, who established the boundaries of the Square, to exclude, as far as practical, Yurok settlement thereon. For if Superintendent Wiley had extended the boundary of the Square in a northerly direction for merely another mile or two, large numbers of Yurok Indians would have been added to the population of the reservation.[18] However, this was unnecessary for the reason that the Yurok Indians were already residing in their ancestral homes along the Klamath River on their own reservation, the Klamath River Reservation, and on the Connecting Strip between the two reservations.[19] For many reasons it would have been foolish and perhaps dangerous to disturb this status quo.

It should be recalled that the Hoopa and Yurok Indians were of different linguistic stock and were historically antagonistic. Both tribes fought the government, as well as each other, to retain their aboriginal homes, and the Yuroks consistently returned to their homes along the Klamath River, even following a devasting flood which destroyed most of the arable land (App. A at 15-16). Furthermore, numerous proposals to remove large numbers of Yuroks to the Square were never carried out. (App. A at 27) Perhaps most revealing is the fact that the Yurok Indians of the Addition, as a group, showed no interest in the Square until its timber resources began to produce significant revenue.

River Reservation was "ideally selected for the Yuroks." *Mattz* v. *Arnett*, *supra* at 487.

[18] *See* the maps (submitted as Plaintiff's Exhibits 10H and 16) which show that the large Yurok settlements of Weitspus and Rlrgr at the confluence of the Klamath and Trinity rivers were definitely outside the boundary of the Square, and that, at most, only a small portion of the third settlement, Pekwtul, fell within the boundary.

[19] App. A at 36, 53-54.

It is unquestionably true that the same ethnic, social, economic and political considerations which convinced government officials in 1864 to maintain the separateness of the Hoopa and Yurok Indians, were just as compelling in 1891 when the reservation was extended,[20] in 1892 and thereafter when subreservations were recognized by Congress and the Secretary through the institution of separate allotment programs, and in 1958 when the Secretary upheld the Hoopas' rights on the Square, as they are today.

In any event, the Hoopa Valley Tribe has always recognized that a few Yurok and other non-Hoopa Indians resided on the Square from early times. These Indians and their descendants became Indians of the Square who are entitled to share, and have shared, equally in the resources of the Square. Such was the conclusion of the Deputy Solicitor in 1958, a conclusion which we contend is fully determinative of this case:

> "Each and every individual member of the many tribes or bands of California Indians was privileged after 1865 to settle upon this reservation [the Square]. None of them was required to do so. Those who accepted became vested with the full incidents of Indian title. Those who did not accept, and chose to remain where they were, or move elsewhere, cannot be properly regarded as being invested with en-

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[20] The Executive Order of 1891 did not disturb this separateness. Contrary to respondents' contention that the Hoopa Valley Reservation was extended in 1891 "in order to accommodate on this reservation the numerous Yurok Indians living nearby. . ." (Respondents' Brief at 10), this Court has found that the major concern of the government officials at that time was to prevent the Yuroks from losing the Klamath River Reservation to white settlement. *Mattz* v. *Arnett*, 412 U.S. 481, 502 (1973). *See also* App. A at 46. There simply was no need to consolidate the two tribes in order to protect the Yuroks from white encroachment, or to satisfy the four-reservation requirement of the 1864 Act. The prior establishment of the so-called "Mission Reservation" had so proven. *See* Petition at 13 n.38.

forceable rights thereon either in themselves or in their posterity.[21]

The controlling factor in the instant case is that unlike the few original non-Hoopa inhabitants of the Square who were entitled to share the Square's resources, respondents are, for the most part, Yurok Indians of the Addition, or their numerous descendants,[22] who neither settled on the Square nor otherwise associated with the Square's inhabitants, and who have already shared in the abundant resources of the Klamath River Reservation and the Connecting Strip,[23] from which the Hoopa Indians have never sought nor received any benefit whatsoever.

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[21] Appendix G at 131 (65 I.D. 59, 65 (1958)).

[22] App. A at 3. In fact, the trial judge held:

"This conclusion of fact as to the presence of Yuroks on the Square prior to white settlement does not, of course, support the claim of the present plaintiff Yuroks of the Addition, who were not introduced into the reservation until 1891. . . ." [App. A at 7.]

[23] The timber resources on the Addition were always regarded as plentiful and extremely valuable. *See Chrichton* v. *Shelton*, 33 L.D. 205, 216-17 (1904). During a more recent survey of conditions of Indian reservations throughout the United States, the Senate Committee on Indian Affairs received a memorandum from the Superintendent of the Hoopa Agency which stated, in part, that "[t]he land on the Klamath is still more rough than the Hoopa, but there is *more valuable timber in isolated tracts on that portion of the reservation*". (Emphasis supplied) Hearings on S.Res. 79 and 308 (70th Cong.), and S.Res. 263 and 416 (71st Cong.), and S.Res. 323 (72d Cong.) Before a Subcomm. of the Senate Comm. on Indian Affairs, 72d Cong., 1st Sess., pt. 29, at 15545 (1932). *See also* Petition of the United States for a Writ of Certiorari, Docket No. 73-1244 (February 13, 1974) at 5 n.3.

CONCLUSION

The Hoopa Valley Tribe respectfully requests that its petition for a writ of certiorari to the United States Court of Claims be granted.

Respectfully submitted,

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PETITION FOR REHEARING ON DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Hoopa Valley Tribe's petition for a writ of certiorari to review the judgment of the United States Court of Claims in this case was denied by this Court on April 22, 1974. In support of this petition for rehearing, petitioner asserts that the filing of a petition for writs of certiorari in the companion cases of *Tonasket* v. *Thompson* and *Nicholson* v. *Laramie*, No. 73-1281, and this Court's Order of April 22, 1974, requesting the views of the United States in *Tonasket* and *Nicholson*, constitute "intervening circumstances of substantial or controlling effect" which call for this Court to reconsider its denial of the Hoopa Valley Tribe's petition for a writ of certiorari in this case.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1973. A petition for certiorari was timely filed on January 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

STATEMENT

In 1958, the Secretary of the Interior ruled that the members of the petitioner Hoopa Valley Tribe were the exclusive owners of that part of the Hoopa Valley Reservation known as the Square. 65 I.D. 59, 68 (1958). Respondents, 3,323 Indians of primarily Yurok extraction, filed suit in the Court of Claims attacking the 1958 decision of the Secretary, and claiming that the United States was liable for denying them their aliquot share of the revenues derived from the sale of timber situated on the tribal lands of the Square.[1] This timber revenue had been previously distributed by the Government exclusively to enrolled members of the Hoopa Valley Tribe, in accordance with the Secretary's prior ruling.

On May 22, 1972, the trial judge of the Court of Claims, rejecting the administrative decision of the Secretary, ruled that the 1891 Executive Order (1 Kappler 815), which had annexed the Addition to the Square, created a single indivisible reservation for the joint

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[1] The Yuroks did have their own reservation—the so-called "Addition"—but this reservation has been almost totally allotted to Yuroks and sold; thus, these plaintiffs have little of their reservation lands remaining. In effect, the Court of Claims' ruling in *Short* has combined the lands of both Indian tribes (Hoopa and Yurok). However, the Yuroks, having disposed of their tribal lands, are now in the position to share with the Hoopas, who kept their tribal lands intact, and thereby receive a double benefit from the property of the Hoopa Valley Reservation, to the detriment of the Hoopa Indians. *See* Petition in No. 73-1104 at 10-12.

benefit of all Indian residents (App. A at 11);[2] and that, consequently, plaintiffs were entitled to a pro rata share of the timber revenue derived from the Square. The trial judge further ruled that 22 of the 26 so-called "sample plaintiffs" were entitled to share as "Indians of the Hoopa Valley Reservation", and set aside the cases of the remaining four sample plaintiffs for retrial and further briefing. (App. A at 112). On October 17, 1973, the Court of Claims affirmed the conclusions and recommendations of the trial judge, *per curiam*, and "remanded to the trial judge for further proceedings." (App. A at 112).

The Hoopa Valley Tribe and the United States Government filed separate petitions for certiorari, seeking Supreme Court review of the Court of Claims decision.[3] In addition, 8 *amicus* briefs, representing more than 15 separate Indian tribes and national Indian organizations,[4] were filed in support of the petition of the Hoopa Valley Tribe. Nevertheless, on April 22, 1974, this Court denied the petitions for certiorari. Justices Douglas and Stewart would have granted certiorari. 42 U.S.L.W. 3595 (April 23, 1974).

Further proceedings before the trial judge of the Court of Claims are now scheduled for the purposes of (1) determining the standards of individual entitlement which may be used in resolving the outstanding claims of the remaining 3,301 plaintiffs for a pro-rata share of the tribal assets of the Hoopa Valley Reservation; (2) re-

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[2] The full text of the opinion below was included as Appendix A to the Hoopa Valley Tribe's petition for certiorari (*Hoopa Valley Tribe* v. *Short*, No. 73-1104). All references to the court's opinion will therefore appear as "App. A at ——."

[3] *Hoopa Valley Tribe* v. *Short*, No. 73-1104; *United States* v. *Short*, No. 73-1244.

[4] *Amicus* briefs were filed by the National Tribal Chairmen's Association and the National Congress of American Indians.

solving the factual disputes as to which of the remaining plaintiffs qualify under the eligibility standards to be established by the court; and (3) computing the amount of recovery for each plaintiff held to be an Indian of the Hoopa Valley Reservation.[5]

A primary question raised before the Court of Claims, and discussed in both petitions for certiorari, concerns the authority and jurisdiction of the Court of Claims to reject the actions of the Secretary of the Interior, with respect to determining individual Indian entitlement to tribal assets, and to substitute its own judgment for that of the Secretary. The Hoopa Valley Tribe urged that the Secretary of the Interior properly exercised his discretion in approving the constitution and bylaws of the Hoopa Valley Tribe, distributing per capita payments exclusively to members of that group, and ruling that plaintiffs had no interest in the Square. (Petition in No. 73-1104 at 15.) The United States urged that "[t]he decision of the Court of Claims unduly interferes with the authority of the political branches of the government to recognize tribal membership and tribal jurisdiction." (Petition in No. 73-1244 at 10-13.)

A materially identical question has been raised in the companion cases of *Tonasket* v. *Thompson* and *Nicholson* v. *Laramie*, No. 73-1281, wherein the governing body of the Confederated Tribes of the Colville Indian Reservation, Washington, pursuant to the provisions of its tribal constitution which had been previously approved by the

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[5] The proceedings before the trial judge promise to be protracted and complex. He has already identified certain issues which must be briefed before proper entitlement standards can be established (*i.e.*, degree of Indian blood; dual tribal status; the effect of birth off the reservation; and the effect of prolonged residence off the reservation). In addition, matters such as voluntary abandonment of tribal relations, the effect of having received termination benefits, among others, must be addressed in order to resolve the claims of the remaining plaintiffs.

authorized representative of the Secretary of the Interior, denied the applications of certain individuals for tribal enrollment.

On February 20, 1974, 37 days after the petition of the Hoopa Valley Tribe was filed herein, the Confederated Tribes of the Colville Reservation petitioned this Court to review the decisions of the Ninth Circuit in *Tonasket* and *Nicholson*,[6] which held that the federal district court had jurisdiction to consider these individual enrollment claims under the Indian Civil Rights Act of 1968 (25 U.S.C. §§ 1301-03). On precisely the same day that this Court denied the petitions for certiorari of the Hoopa Valley Tribe and the Government in *Short*, *i.e.*, April 22, 1974, it requested the Solicitor General to present his view in the twin enrollment cases of *Tonasket* and *Nicholson*. 42 U.S.L.W. 3954-55 (April 23, 1974). Petitioner submits that the filing of the petition for certiorari in *Tonasket* and *Nicholson*, and this Court's subsequent request for the views of the United States, constitute intervening circumstances of substantial and controlling effect which warrant a rehearing, under Supreme Court Rule 58, of the Hoopa Valley Tribe's petition for certiorari, *cf. Forgett* v. *United States*, 390 U.S. 203 (1968), at least if certiorari is granted in *Tonasket* and *Nicholson*.

ARGUMENT

1. The cases of *Tonasket*, *Nicholson*, and *Short* involve the same threshold issue of federal jurisdiction, *i.e.*, whether the federal courts have jurisdiction, under the Indian Civil Rights Act, or otherwise, to determine questions of tribal membership. Plaintiffs in *Tonasket*

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[6] The Colville petition was filed 7 days after the government's petition for certiorari was filed in *United States* v. *Short*, No. 73-1244.

admittedly seek enrollment in the Colville Confederated Tribes in order to share tribal benefits. Although plaintiffs in *Short* are not seeking enrollment in the Hoopa Valley Tribe as such, it is unquestionably true, nevertheless, that they do seek to be included in the reservation tribal entity which is entitled to share in the communal assets of the Hoopa Valley Reservation. The Court of Claims has charged the trial judge with the task of preparing a reservation roll for the Hoopa Valley Reservation. This compilation will be used for the express purpose of determining individual substantive entitlement to the unallotted or tribal property of that reservation.

It is immaterial whether the trial judge will actually be determining membership in the Hoopa Valley Tribe,[7] the Yurok or Klamath River Tribe, or some new tribal entity which now occupies the extended Hoopa Valley Reservation. The essential fact is that he will be called upon to determine individual Indian entitlement to tribal property, *but cf. Cherokee Freedmen* v. *United States*, 195 Ct. Cl. 39 (1971), a determination that will be binding on the Secretary in his future stewardship of the reservation.

The authority to make such determinations has been expressly delegated by Congress to the Secretary of the

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[7] The Hoopa Valley Tribe is a federally recognized Indian tribe. The Yurok Indians are not so organized and have done little to maintain their tribal identity. Furthermore, it is as yet unclear what influence the new Yurok majority will have on the political, social and economic affairs of the Hoopa Valley Tribe, as a result of the Court of Claims consolidation. It is significant that since this Court's denial of certiorari on April 22, 1974, certain Yurok leaders have vigorously renewed their demands that the Bureau of Indian Affairs withdraw its recognition of the Hoopa Valley Tribe. Therefore, we may well regard the actions of the Court of Claims, in years to come, as the final determination of enrollment in the Hoopa Valley Tribe of Indians.

Interior, under 25 U.S.C. § 163,[8] and, in the case of the Hoopa Valley Reservation, the Secretary has previously exercised this discretion in a reasonable and prudent manner under the circumstances. *See Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899); *cf. Slattery* v. *Arapahoe Tribal Council*, 453 F.2d 278 (10th Cir. 1971). *See also* Petition of United States for a writ of certiorari in *United States* v. *Short*, No. 73-1244 at 10-13.

In summary then, the cases of *Short*, *Tonasket*, and *Nicholson* raise the following questions in common:

A. Whether the federal courts have jurisdiction, under any circumstances, to determine tribal enrollment, or whether such determinations are political in nature, and, therefore, exclusively within the province of the Tribe and the Congress?

B. Whether a federal court can substitute its judgment for that of the Secretary of the Interior in the exercise of his discretion under 25 U.S.C. § 163?

2. In addition to the unresolved questions of law common to *Short*, *Tonasket*, and *Nicholson*, it should be noted, as well, that the cases are factually related, and will inevitably follow a similar course in the wake of Supreme Court review on certiorari. For it is most significant that the critical factor raised as a bar to plaintiffs' enrollment in *Tonasket* and *Nicholson*, *i.e.*, membership in a

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[8] 25 U.S.C. § 163 provides in pertinent part:

> The Secretary of the Interior is authorized, wherever in his discretion such action would be for the best interest of the Indians to cause a final roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood, and when approved by the said Secretary are declared to constitute the legal membership of the respective tribes for the purpose of segregating the tribal funds as provided in section 162 of this title, and shall be conclusive both as to ages and quantum of Indian blood . . . .

different Indian tribe,[9] has been identified by the trial judge as a subject for further briefing and retrial in *Short*.[10] Thus, assuming that this court denies certiorari in *Tonasket* and *Nicholson*, the federal district court will then be charged with determining the effect of dual tribal status on tribal enrollment, precisely the same question now before the trial judge in *Short*. Conversely, assuming that this court grants certiorari in *Tonasket* and *Nicholson* and ultimately rules that federal courts lack jurisdiction to determine tribal enrollment, we contend, in that case, that the enrollment proceedings now scheduled before the trial judge in *Short* would be in violation of that ruling.

CONCLUSION

Inasmuch as the cases of *Tonasket*, *Nicholson*, and *Short* raise materially identical questions, petitioner submits that if this Court is disposed to grant the petition for writs of certiorari in *Tonasket* and *Nicholson*, it should also grant the petition for a writ of certiorari in this case.[11]

Petitioner respectfully requests, therefore, that the Hoopa Valley Tribe's petition for certiorari be reheard by this Court in conjunction with the petition for cer-

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[9] The factual backgrounds in *Tonasket* and *Nicholson* are summarized in the petition of the Colville Confederated Tribes, *Tonasket* v. *Thompson*, No. 73-1281, at 4-10.

[10] App. A at 110.

[11] The Colville Confederated Tribes filed, on February 6, 1974, a statement *amici curiae* in support of the Hoopa Valley Tribe's petition for a writ of certiorari in *Short*. Leave to file such statement was granted by this Court on April 22, 1974. 42 U.S.L.W. 3595 (April 23, 1974). The Hoopa Valley Tribe has recently moved for leave to file a statement *amicus curiae* in support of the Colville Confederated Tribes' petition for writs of certiorari in *Tonasket* and *Nicholson*. Said statement was filed on April 4, 1974 and is presently pending before the Court.

tiorari now pending in *Tonasket* v. *Thompson*, No. 73-1281.[12]

Respectfully submitted,

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Of Counsel

May, 1974

[12] It should be noted that petitioner has not requested the Court of Claims to stay its proceedings in *Short* pending Supreme Court action on this petition for rehearing.

CERTIFICATE OF COUNSEL

Comes now JERRY C. STRAUS, counsel for petitioner, Hoopa Valley Tribe, and respectfully certifies that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specifically set forth in Rule 58(2) of the Revised Rules of the Supreme Court of the United States.

JERRY C. STRAUS
Counsel for Petitioner

CERTIFICATE OF SERVICE

Petition for Rehearing on Denial of Petition for a Writ of Certiorari to the United States Court of Claims served this 16th day of May, 1974, by mailing three copies first class, postage pre-paid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, attorney for respondent United States, and air mail, postage pre-paid, to Harold C. Faulkner, Esq., and William C. Wunsch, Esq., c/o Faulkner, McComish & Wunsch, 351 California Street, San Francisco, California 94104, attorneys for respondents Jessie Short, et al.

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